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Supreme Court, U.S.
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No. 991336 NOV 17 1999

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

TERRY JONES,
Petitioner,

vs.

LINCOLN ELECTRIC Co., et al.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Court of Appeals has in the instant Opinion fashioned a new, overly deferential harmless error standard, which serves to eviscerate the pretrial disclosure requirements of the Federal Rules of Civil Procedure 26 and 37, as amended in 1993, thereby facilitating the type of "trial by ambush" the Federal Rules of Civil Procedure were designed to prevent, and which has thereby deprived Petitioner of his rights to due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and which has also served to deprive Petitioner of his right to a trial by jury, as guaranteed by the Seventh Amendment to the Constitution of the United States.

2. Whether the Court of Appeals for the Seventh Circuit erred in its application of the harmless error standard to the pretrial discovery disclosure requirements of Federal Rules of Civil Procedure (26) and (37), with respect to the improperly admitted testimony of Professor Thomas Eagar, a metallurgist, who at trial offered on Defendant's behalf previously undisclosed medical testimony outside his expertise and competency under Rule 702, as the Court of Appeals erred as a matter of law in finding that the improperly admitted and highly prejudicial testimony of Professor Eagar was harmless error, as the medical evidence adduced at trial was not so one sided as to make the outcome of a retrial of this cause a foregone conclusion.

3. Whether there exists a conflict between the the Seventh Circuit's "harmless error" standard set forth in this opinion and other Circuits of the Federal Court of Appeals regarding the enforcement of Federal Rules of Civil Procedure 26 and 37, which needs to be harmonized.

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PETITION FOR WRIT OF CERTIORARI
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The Petitioner Terry Jones respectfully prays that a writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on July 29, 1999, affirming the District Court's denial of Plaintiff's Rule 59 and 60(b) (2) motions for new trial, and of the denial of Plaintiff's motions brought pursuant to the Trial Court's contempt powers and affirming the District Court's rulings, which allowed Thomas Eager, Ph. D., a metallurgist, to testify outside his area of expertise, in violation of FRE 702, and in violation of FRCP 26 about the medical effects of manganese fumes on the human body, and specifically, that welding fumes were not toxic to the human body, and that there is no measurable toxic effect of welding fumes or manganese in the fume to the human body.

OPINION BELOW

The Order and Opinion of the Court of Appeals appears in the appendix hereto.

V. JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit, affirming the District Court's order denying Plaintiff's Post Trial motions, was entered on the Twenty-Ninth Day of July, 1999. Plaintiff timely filed a Petition for Rehearing on August 12 1999, which the Court of Appeals for the Seventh Circuit denied on August 19, 1999. The jurisdiction of the District Court was invoked pursuant to Title 28 U.S.C., Section 1332 and the jurisdiction for the Court of Appeal was pursuant to Title 28 U.S.C., Section 1291. The jurisdiction of this Court's is invoked pursuant to Title 28 U.S.C., Section 1254.

VI. CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendments 5, 7, 14

VII. STATEMENT OF THE CASE

Petitioner Terry Jones brought a product liability action against the Defendants, who are welding rod manufacturers and distributors, alleging negligence and strict liability, leading to his injuries and permanent disability. Plaintiff initially brought the action in the United States District Court, Northern District of Illinois. The action was later transferred to the Northern District of Indiana. Plaintiff's action was based upon diversity of citizenship under 28 U.S.C., 1332.

Petitioner was employed as a welder for 28 years, and throughout his welding career he was routinely exposed to the manganese present in welding fume produced by defendants' welding rods. TR. 110,126,140,231. Petitioner ended his career as a welder in 1992 at the age of 47 when he experienced a movement disorder diagnosed as parkinsonism, which made it physically impossible to continue welding. Petitioner attributed his movement disorder, which he later learned was caused by manganism, to the years of exposure to the manganese contained in the welding rods manufactured and sold by Defendants, by breathing in the fumes generated during welding. TR. 121,126,353,376.

Plaintiff brought a product liability action against Defendants alleging claims of negligence and strict liability. R. 1, 113. Plaintiff claimed that Defendant knowingly manufactured and sold welding rods containing the neurotoxin manganese even though they knew of the dangers and hazards associated with manganese in welding fumes, and that Defendants knowingly failed to take any reasonable precautions against the inevitable harm caused by manganese fumes during the welding process including furnishing adequate warnings and instructions. Id.

This cause came to be tried before a jury in 1997. The principal issue at trial was whether Plaintiff suffered from manganese induced parkinsonism, attributable to defendants products, or from parkinsonism without a known cause, which is called "idiopathic parkinsonism." Slip Op. At 5,25. Central to Defendants' defense was their claim that Plaintiff's manganese exposure was not related to Petitioner's particular illness because the manganese from the welding rods was too insignificant to result in manganese-induced parkinsonism. TR. 1937-38.

I. MEDICAL EXPERT TESTIMONY

A. Testimony of Plaintiff's Expert

In resolving the causation issue both plaintiff and defendant relied upon conflicting testimony of medical expert witnesses. Petitioner called Dr. Klawans, of Rush-Presbyterian St. Luke's Medical Center in Chicago, as his medical expert witness. TR. 376. Dr. Klawans held the only endowed chair in the study of Parkinson's Disease in the country, sponsored by the United Parkinson Foundation. TR. 319-20.

Dr. Klawans testified that both manganese-induced parkinsonism and idiopathic parkinsonism are marked by similar signs and symptoms. TR. 325-27. He testified that almost every patient has a unique set of symptoms which represents a subset of the general groups of symptoms. TR. 328. Dr. Klawans noted that plaintiff had many of the symptoms associated with both

manganese-induced parkinsonism and Parkinson's disease, specifically tremors, slowness, and rigidity. TR. 377-78. Dr. Klawans additionally indicated that Plaintiff suffered from "jerking" of his muscles, called "myoclonic syndrome", which is commonly seen in patients with manganese-induced parkinsonism and not typical for patients with Parkinson's disease. TR. 376. Due to the similarity in symptoms,Dr. Klawans emphasized that Plaintiff history of manganese Dr. Klawans emphasized that Plaintiff history of manganese Dr. Klawans emphasized that Plaintiff history of manganese was essential to a proper diagnosis. TR. 375-76.

Dr. Klawans' further testified that once manganese crosses the blood-brain barrier and enters the brain, cell damage occurs in various parts of the brain." TR. 373-74. Dr. Klawans testified that the medication Sinemet (a medication taken by plaintiff) is a drug which helps treat the symptoms of manganese-induced parkinsonism. TR. 380-81.

B. Testimony of Defendant's Expert

Dr. Charles Olanow testified as Defendants' medical expert witness. Dr. Olanow is a neurologist with a sub-specialty in movement disorders. TR. 979-80. Dr. Olanow testified that Petitioner suffered from Parkinson's disease, based upon Petitioner's reaction to Sinemet, which Dr. Olanow opined is a successful treatment for Parkinson's disease and not manganese-induced parkinsonism. TR. 996. This testimony by Dr. Olanow was undermined when he acknowledge that an advertisement for Sinemet, found in the same medical journal as his article appeared in, it stated that Sinemet is indicated for manganese-induced parkinsonism. TR. 1099-1103. During the course of his testimony, Dr. Olanow admitted that that he was aware that Dr. Cotzias, the person responsible for inventing sinemet indicated it is used for maganese- induced parkinsonism, and that the medication produces a positive response in cases involving manganism. TR 1050-51.

II. TESTIMONY OF TREATING PHYSICIANS

The record shows that at the time they made their diagnoses of Petitioner's neurological condition, none of Petitioner's treating physicians were aware of Petitioner's history of exposure to manganese welding fumes. TR. 1602, 607, 1610, 1699-1700, 1710.

III. PROFESSOR EAGAR'S TESTIMONY

Thomas Eagar, Ph.D. testified after the jury heard the testimony of the medical expert witnesses, and after it had heard the testimony of most of Petitioner's treating physicians. Thomas Eager is a professor of materials and engineering and the head of Material Sciences at the Massachusetts Institute of Technology. Slip Op. at 14. During the course of the trial, Professor Eager testified about welding and the welding process. Id.

However, the District Court allowed Eager to also testify, outside his area of expertise about the medical effects of manganese to the human body. R. 152, Ex. H.P. 90-91. Over numerous objections by Petitioner's counsel, Dr. Eagar testified about the ability of the body to absorb manganese from welding fumes, and about the toxicity of manganese from welding fumes to the human body. TR. 1386-88.

The District Court at first sustained Petitioner's counsel's numerous objections to Dr. Eagar's testimony about the body's ability to absorb manganese from welding and about the toxicology of manganese on the grounds that they were opinions outside his expertise and hearsay. TR. 1382-85. Then Dr. Eagar claimed his opinions were the result of joint research he had conducted with Professor Brain of Harvard School of Public Health, and that the two of them had published articles together on the results of their research. TR. 1383-86. After Dr. Eagar made those claims the District Court reversed its rulings, overruled plaintiff's objections, and allowed Dr. Eagar to testify to his opinions about the absorption by the body of manganese

from welding fume, and the toxicity. TR. 1387-89. The Court of appeals also affirmed the trial court's decision to permit Dr. Eager to testify, without having made a pretrial
disclosure, that an epidemiological study established that welders did not have any more health problems than non-welders, and that welding steel has no impact on the health of welders. TR. 1424-25.

NEWLY DISCOVERED EVIDENCE

Following the trial, and the drafting of Petitioner's Rule 59 motion for New Trial, Plaintiff learned that Professor Eagar falsely testified on a number of material points of his trial testimony. Professor Eagar falsely testified to the facts that had formed the basis for the District Court's ruling that had the necessary qualifications to give testimony on the issue of the absorption of manganese and the toxicity of manganese in welding fumes. Eagar testified himself in a subsequent case that he had not participated or contributed to Dr. Brain's studies. R. 107 pp. 17-18.

Prior to this case, Professor Eagar had testified he had no expertise in the health effects of welding and that the Caterpillar study had nothing to do with manganese from welding, and that he had never reached any conclusions based upon that study. R. 106-07, pp. 29-32. See Exhibit K to Plaintiff's Post Trial Motion, made a part of the Appendix Herein. Petitioner posited this misconduct as grounds for a new trial pursuant to Rule 60, and as a basis for filing a rule to show cause against Dr. Eager.

VIII. REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Seventh Circuit has in the instant opinion, fashioned a new, overly deferential harmless error standard, which serves to eviscerate the pretrial disclosure requirements of the Federal Rules of Civil Procedure 26, and enforcement of these requirements pursuant to FRCP 37, as amended in 1993, thereby facilitating the type of "trial by ambush" the Federal Rules of

Civil Procedure were designed to prevent, and which has thereby deprived Petitioner of his rights to due process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and which has served to deprive Petitioner of his right to a trial by jury, as guaranteed by the Seventh Amendment to the Constitution of the United States.

The Record, and the Appeals Court's own findings show that Dr. Eagar is not an epidemiologist and that none of his opinions dealing with the health of welders, and none of the epidemiological standards and studies which formed the basis for his medical opinions presented at trial were disclosed by Defendants prior to trial. Jones v. Lincoln Electric 1999 WL 551879 (7th Cir. (Ind), Slip Op. at 20-23. R. 58.

Indeed, the Seventh Circuit found that Dr. Eager, while well credentialed as a metallurgist, had no experience in assessing the toxicology or other health effects of manganese on the body, and was not qualified to render an expert opinion about matters which were essentially medical or biological in nature. Jones v. Lincoln Electric 1999 WL 551879 (7th Cir. (Ind), Slip Op. at 20-23.

The Court of Appeals further found that Eager's testimony about the conclusions reached by Dr. Brain were hearsay, as any questions regarding the methodology and conclusions of the study were not amenable to meaningful cross examination, because Eager did not have the necessary background to fully explain how the conclusions were reached, and accordingly, it was Dr. Brain, who was not present in open court, who would have been the proper person to testify as to the findings. Id at 22, 23, footnote 7.

In its opinion, the Court of Appeals indicated that it was of the belief that the trial court abused its discretion in allowing Professor Eager to testify as an expert about matters outside his areas of competence and expertise, and that Defendants violated

the pretrial disclosure requirements of Rule 26, dealing with disclosure of expert opinions, the bases of their opinions, and the documents and materials they have relied on and will use at trial. Slip Op. 20-23. However, in arriving at its legal determination that in the context of Rules 26 and 37, as amended in 1993, this palpable error was nevertheless harmless, the Court of Appeals reached to a 1967 criminal case dealing with the standards to be imposed in granting or denying habeas corpus relief for "harmless constitutional errors." Chapman v. California 386 U.S. 18, 56, 87 S.Ct. 824, 844 (1967). The Court of Appeals has also seen fit to find authority for its ruling in other cases which predate the amendment to the Rules, and which in fact do not discuss the issue of the fashioning and application of a proper harmless error standard in the specific context of violations of discovery disclosure requirements by prevailing parties. Slip Op. at 24, citing DeBiasio v. Illinois Central 52 F. 3d 678, 685 (7th Cir. 1995), Cook v. Hoppin 783 F. 2d 684, 691 (7th Cir. 1986), Walton v. United Consumer Club, Inc. 786 F. 2d 303, 313 (7th Cir. 1986). The true import of these cases (which merely restate the generally accepted proposition that harmless error at trial is usually not grounds for reversal on appeal), is that it allows the Court of Appeals to impose on the victim of a violation of Federal Rule of Civil Procedure 26 and 37, the burden of having to disprove a negative, i.e., that the error was not harmless. By citing to cases that pre-date the 1993 amendments, the Seventh Circuit.

Other federal reviewing courts outside the Seventh Circuit have examined this same issue, and have reached an entirely opposite result from that presented in the case at bar. These courts have held in circumstances where there has been a breach of discovery rules and discovery orders, any "uncertainties attending the application of hindsight in this area should favor the

party that was denied discovery because parties ought not to benefit from their own mis-, mal- or nonfeasance."Klonoski v. Mahlab 156 F. 3d 255 at 274, 275 (1st Circuit 1998) citing Anderson v. Cryovac 862 F. 2d 910 (1st Cir. 1988).

In Klonski, the Court held that under FRCP 60 (b) the court may relieve a party from a final judgment, order or proceeding for the fraud, misrepresentation, or other misconduct of an adverse party, and that the failure to disclose or produce materials requested in discovery can constitute "misconduct" within the purview of that subsection. Klonski, at 274, citing Anderson at 923, citing Rozier v. Ford Motor Co. 573 F. 2d 1332, 1339 (5th Cir. 1978).

"Misconduct" in the context of discovery violations does not demand proof of nefarious intent or purpose as a prerequisite for its redress by a court, and ought to be given an expansive meaning : "The term can cover even accidental omissions–elsewise it would be pleonastic, because 'fraud' and "misrepresentation' would likely subsume it . . . it takes scant imagination to conjure up discovery responses which, though made in good faith, are so ineptly researched or lackadaisical that they deny the opposing party a fair trial. Accidents–at least avoidable ones–should not be immune from the reach of the rule. Thus ... relief on the ground of misconduct may be justified whether there was evil, innocent or careless purpose." Klonski at 274, 275, citing Anderson at 923, Bros. Inc. v.W.E. Grace Mfg. Co. 351 F, 2d 208, 211 (5th Cir. 1965), cert. denied, 386 U.S. 936, 86 S.Ct 1065 (1966).

Rule 37 (c) (1) was adopted in 1993. It provides that a party that without substantial justification who fails to disclose information required by Rule 26 shall not, unless such failure is harmless, be permitted to use as evidence any witness or information not so disclosed. Other sanctions are available in lieu to or in addition to barring the testimony, including payment of reasonable attorneys fees caused by the failure, and may include informing the jury of the failure to make the disclosure. FRCP 37

(c) (1). The new rule clearly contemplates stricter adherence to discovery requirements, and harsher sanctions for breaches of the rule, rendering the required sanction in ordinary cases mandatory preclusion of the evidence. Klonski at 269.

Expert witnesses occupy a special place in a litigant's arsenal: while they are sworn to tell the truth, they are paid, and often far from objective. Under the rules, an expert can bring into the courtroom and to the jury's attention opinions, hearsay, third party testimony and documents which would not be permitted to a lay witness. See Expert Witnesses Under Rules 703 and 803(4) of the Federal Rules of Evidence: Separating the Wheat From the Chaff 72 Ind. L. J. 939 (1997). Since an expert is hired by a litigant, and not by the court, it is expected that the adverse party will also retain an expert who will be similarly qualified, but will render an opposite opinion. Resolution of the ultimate issue is accomplished by presenting the contending theories, facts and opinions to a jury of laymen, who under our adversarial system, are charged with the duty of finding the facts and determining the truth. For that reason, careful, honest, and forthright pretrial disclosure of expert opinions and their bases is not an option in our system.

In the instant case a litigant committed misconduct, as it is defined by our courts, by using testimony which had not been disclosed, and hence not subject to the meaningful adversarial testing that is required before it can be disseminated to the jury. Reviewing courts which have applied Rule 37, as amended in 1993, have not hesitated to reverse district courts and award new trials on the basis that an expert witness's testimony had not been disclosed prior to trial. See Licciardi v. TIG Ins. Group, 140 F. 3d 357 (1st Cir 1998).

In the instant case, the litigant who benefitted from the misconduct may well have won the trial as a result of the improper testimony. Yet the Seventh Circuit has articulated a "harmless error" standard which is so broad and liberal as to render the

remedial and prophylactic purposes of Rule 37 meaningless. In this case, by placing the burden on the victim of the misconduct, the Court of Appeals has rewarded the beneficiary of the misconduct, and has through a judicially countenanced "trial by ambush" allowed Petitioner's rights to a fair trial by jury as guaranteed by the Seventh Amendment, and
to Petitioner's fundamental rights to due process as guaranteed by the Fifth and Fourteenth Amendments, to be abrogated.

If this opinion is left to stand undisturbed, it will not only yield an inequitable and disgraceful result in the instant case, it will encourage future such misconduct. A litigant practicing "trial by ambush" will know that having taken a minimal risk (an objection sustained, a relatively modest fine, balanced against staving off a potentially significant verdict) and succeeded, his ill gotten trial victory will not be disturbed on appeal.

Petitioner respectfully submits that in the interests of equity and enforcing full and uniform compliance with Rules 26 and 37, this Honorable Court should adopt a legal standard which would, in consideration of motions for new trial and on appeal, impose on the beneficiary of evidence not disclosed prior to trial in violation of Rule 26, or in violation of FRE 702, the burden of a rebuttable presumption that the evidence was prejudicial. Petitioner respectfully submits that the facts of this case warrant remand to the court for a new trial, and for further remedial action.

2. The Court of Appeals for the Seventh Circuit erred in its application of the harmless error standard to the pretrial discovery disclosure requirements of Federal Rules of Civil Procedure (26) and (37), with respect to the improperly admitted testimony of Professor Thomas Eagar, a metallurgist, who at trial offered on Defendant's behalf previously
undisclosed medical testimony outside his expertise and competency under Rule 702, as the Court of Appeals erred as

a matter of law in finding that the improperly admitted and highly prejudicial testimony of Professor Eagar was harmless
error, as the medical evidence adduced at trial was not so one sided as to make the outcome of a retrial of this cause a foregone conclusion.

In its opinion, the Court of Appeals noted that " in order to prevail at trial, Jones had to prove, first and foremost, that he actually suffered from manganism,"and concluded that because "**the overwhelming medical evidence at trial indicated that Jones suffers from idiopathic parkinsonism rather than manganism,**" this "overwhelming" evidence that clearly show[ed] that Jones did not suffer from manganism in the first place "substantially diminishe[d] the relative importance of testimony regarding whether welding fumes emitted from Defendants' products could have caused Jones to develop that disorder." Slip Op. at 24, 25. (Emphasis added).

Respectfully, in this case, the Court of Appeals placed the evidentiary cart before the horse. Respected jurists and scholars have noted that because so little is empirically known about the workings of a jury, evaluating the impact of improperly admitted evidence as being harmless or prejudicial is a task that needs to be approached by reviewing courts with extreme caution. See Chapman v. California 386 U.S. 18, 56, 87 S.Ct. 824, 844 (1967) (Justice Harlan, dissenting) , citing Kalven & Zeisel, The American Jury, passim.

The overwhelming weight (and bulk) of the testimony on the issue of medical causation in the proceedings below came through the conflicting testimony of two highly qualified paid expert medical witnesses, the neurologists Dr. Olanow and Dr. Klawans. The combined testimony of these witnesses comprises nearly 300 pages of the entire Record. (R-315-468, 979-1116).

Clearly, the expert medical evidence before the jury was conflicting, and without more, one view or another could have

properly and fairly have been considered by the jury in reaching a verdict.

Yet the Court of Appeals has seen fit to find the cumulation of Dr. Olanow's paid testimony, and the testimony of " all of Jones's own treating physicians," to the effect that they had diagnosed Plaintiff as suffering from parkinsonism without a known cause, as constituting "overwhelming evidence" that Jones suffered from idiopathic Parkinsonism and not manganism, therefore rendering Eager's improper and prejudicial testimony harmless: "the testimony of Dr. Olanow and Jones's treating physicians **either expressly or implicitly ruled out manganese exposure as the originating cause of Jones's neurological injury.**" Slip Op. at 25. (emphasis added). While the above quoted phrase may accurately summarize and restate the testimony of Dr. Olanow, it is not a fair and accurate summation of the testimony of all of Jones's treating physicians. Respectfully, seen in light of the totality of the evidence presented at trial, the findings of the Court of Appeals with respect to the testimony of the treating physicians on this score is fundamentally mistaken, and objectively cannot be seen as indicative of "overwhelming" medical evidence in the record supporting a finding that Dr. Eager's testimony was harmless.

The Record is clear that none of Plaintiff's treating physicians were aware at the time they made their diagnoses of "parkinsonism without a known cause" of Plaintiff's persistent and prolonged occupational exposures to manganese welding fumes. TR. 1602, 1607, 1610, 1699-1700, 1710. The evidence of record in this cause is that none of the medical witnesses, except for Dr. Klawans, made a positive diagnosis of the cause of Plaintiff's injuries; rather, they merely determined that Plaintiff's injuries resulted from an "unknown" cause--thus, the diagnosis of idiopathic Parkinson's Disease. These findings are significant in light of the fact that the treating physicians were not aware of Plaintiff's history of occupational exposure to manganese welding

fumes. Both expert and treating physicians testified that in the field of neurology a complete and comprehensive history is probably the most essential factor for a proper diagnosis.

This Court found that both Dr. Olanow and the treating physicians found a "noticeable absence of 'atypical' features suggestive of manganism" Slip Op. at 25. Yet the Record discloses that one of Mr. Jones's treating physicians, Dr. Rho found an atypical tremor in the Plaintiff. (Tr., at pg. 1602). Dr. Rho testified that he had no prior knowledge of neurological effects of manganese, and that he has never done any medical research concerning welding and manganism. (Tr., at p. 1603). Dr. Shannon testified that she did not consider Plaintiff's occupational exposure to manganese when she examined the Plaintiff and made her diagnosis. (Tr., at pp. 1146, 1148). Dr. Shannon testified that in neurology, more than any other branch of medicine, the patient's history was one of the most important factors in making a diagnosis. (Tr. at pp. 1138-1140, 1147). Yet Dr. Shannon testified she never considered Plaintiff's occupational history of exposure to manganese, and that her initial review of medical records from another physician Dr. Comella,(who was not present at trial) revealed a notation in Plaintiff's medical chart that Plaintiff had not been exposed to manganese. (Tr., at pp. 1143-1144, 1146, 1148). Dr. Shannon testified that prior to making her own diagnosis, she asked Plaintiff what he did for a living, but she did not recall ever asking Plaintiff about any of his occupational exposures. (Tr pp. 1146). Dr. Shannon testified that she did not know how much exposure to manganese Plaintiff had as a welder, and that she did not as a practice, follow up on "those kinds of historical details...we don't chase our tails getting manganese levels, et cetera, if we don't think they're relevant to the clinical picture. That's part of the art of practicing medicine." (Tr. at pp. 1148)

Dr. Galen testified that he did not consider Plaintiff Jones' toxic exposure to manganese because of the entry in the chart

made by Dr. Comella that stated no manganese exposure. (Tr., at pg. 1699, Exhibit R). Dr. Galen further testified at trial that he did not want to get involved in the issue of causation.(Tr., at pg. 1700). Dr. Galen also testified contrary to defense expert Olanow's opinion, that dopamine works in some manganese-induced Parkinsonism cases. (Tr., at pg. 1700, 1701). Dr. Galen also admitted that "manganese is a known causation of Parkinson's disease "when the threshold limit value is exceeded in the workplace." (Tr. at 1700).

A review of the above and foregoing should conclusively demonstrate to this Honorable Court that the Court of Appeals erred as a matter of law in finding that the totality of the medical evidence arrayed against Plaintiff was so overwhelming as to render Dr. Eager's undisclosed fact and opinion testimony about medical issues he was not qualified to explain to the jury harmless, and ought to be corrected.

The trial court, which participated in the proceedings and, unlike the Court of Appeals, was in a position to gauge the demeanor and credibility of the witnesses, was in a superior position to a reviewing court to gauge the impact of Dr. Eager's testimony. The trial court recognized the impact of the testimony about Dr. Brain's study when it ruled on the matter at trial. After being told by the defendants' attorney at the time of the ruling that "the court's ruling . . . was proper." The Court responded, "Your verdict may depend on it." (Tr., at pg. 1440). The Court's comments were made after plaintiff's medical expert testified and after the defendants had put Dr. Olanow and Dr. Shannon on the witness stand. The trial court had already heard the bulk of the medical testimony when the trial court made this comment. Because the medical aspect of Plaintiff's case (i.e., proximate cause) was pointedly debated at trial, the undisclosed "expert" hearsay testimony of Thomas Eagar regarding the conclusions reached by the "Joint Research," that there is no measurable toxic effect of manganese-containing welding fume on the body,

cannot be seen as "harmless" but instead, must be seen as highly prejudicial, and likely to have been determinative of the outcome of this trial. TR. 1383-89.

Given the fact of the medical witnesses' inability to identify the particular "cause" of Plaintiff's injuries, Eagar's testimony was devastating to Plaintiff's case: he was the only defense witness who testified that the manganese from welding fumes **COULD NOT** have caused Plaintiff's injury.

This categorical exclusion was not part of the testimony of testimony in question was far from harmless. The Court of Appeals Defendant's expert neurologist, nor was it contained in the testimony of Petitioner's treating physicians. Thus, the admission of the determined that Professor Eager's testimony regarding the Caterpillar study to be "more or less cumulative of his testimony regarding the Joint Research because both portions of his testimony conveyed the message to the jury that the manganese content in welding fumes generated by mild steel welding rods is too insignificant to cause manganism in welders." Slip Op. at 31.

Respectfully, cumulative erroneously admitted and prejudicial testimony should be subject to being barred in the same manner as is the initial erroneously admitted and prejudicial testimony. As was shown above, the medical causation testimony was not so one-sided as to allow an inference that admission of this prejudicial testimony, which was likely to have been dispositive of the case, was harmless. Further, the other two grounds that the Appellate Court advanced in support of its finding that the error was harmless simply cannot stand: while Plaintiff may have cross examined Eager, his testimony was allowed, and did stand. The jury may well have felt that in spite of Plaintiff's cross examination, the very fact that Eager was allowed to testify about these matters indicated to the jury that the Court found his qualifications to be sufficient. Further, due to the failure to disclose that this testimony would be given, Plaintiff was

not afforded a full and fair opportunity to cross examine the witness, and offer evidence in rebuttal.

Finally, the Court of Appeals pointed to Plaintiff's ability through the introduction of evidence showing that manganism could be caused by manganese in welding fumes, to make a case that welding fumes could cause health problems for welders.

This evidence, which may have been sufficient to establish a prima facie case for Plaintiff, was fully and fairly disclosed to Defendants prior to trial, and they had an opportunity to prepare their cross examination as a result.

In contrast, this was not the case with respect to Dr. Eager's testimony, which was not disclosed, and which effectively undermined Plaintiff's prima facie case at a critical stage of the proceedings. Aside from being intrinsically prejudicial to Plaintiff's case, Dr. Eager's improper and undisclosed testimony about an ultimate issue in this case was truly an example of the "trial by ambush" which the Federal Rules of Civil Procedure were designed to prevent, as it did not afford Plaintiff the opportunity to investigate, cross examine, offer rebuttal evidence, thereby undercutting and undermining the jury's crucial fact finding role. Under similar circumstances, other reviewing courts have held that the improperly admitted evidence was not harmless, and the court's error in allowing the evidence warranted the grant of a new trial. Klonoski v. Mahlab 156 F. 3d 255 (1st Circuit 1998) (cert. den. 119 S. Ct. 1334) "We cannot know with certainty what impact the letter excerpts had on the jury, but to dismiss what happened as harmless error would render discovery rules and orders issued thereunder useless), citing Anderson v. Cryovac 862 F. 2d 910 (1st Cir. 1988), see also Finley v. Marathon Oil Co. 75 F. 3 d 1225, at 1231 (7th Cir. 1996). (observing that "after hearing a welter of confusing and contradictory testimony, perhaps of a technical nature, as here, or being led through a maze of documents a jury is invited . . . to resolve its doubts on the basis of simple, readily understood, but

inadmissible evidence.").

3. There exists a conflict between the the Seventh Circuit's "harmless error" standard set forth in the opinion in issue and other Circuits of the Federal Court of Appeals regarding the enforcement of Federal Rules of Civil Procedure 26 and 37, which needs to be harmonized.

Since enactment of the 1993 amendments to Rules 26 and 37, the federal courts in the various circuits of the Court of Appeals have dealt with issues similar to those in the case at bar. See Eaton, Annotation: Propriety of Exclusion of Expert Testimony as Sanction Under Federal Civil Procedures Rule 37 (B) (2) (B) For Violation of Discovery Order 151 A.L.R. FED 561 (1999), See Also New Trial--Failure to Supplement Discovery--Surprise Testimony 13 No. 8 Fed. Litigator 227 (1998).

As one District Court recently noted, "Under the normal operation of Rules 26 and 37 of the Federal Rules of Civil Procedure, an expert may not extend his or her direct testimony beyond the opinions and bases disclosed in the Rule 26(a)(2)(B) report, and may not, on direct examination, cover new work thereafter. . . .The fact that such an expert, as a matter of litigation tactics, chooses to wait and see what references the opposition discovers on its own and then prepares a rebuttal report thereon does not cure the omission in the Rule 26 (a) (2) (B) report. Such a course reflects deliberate litigation tactics, not an inadvertent oversight or an excusable lapse. The disruption caused by such tactics is not harmless. " Atmel Corp. v. Information Storage Devices, Inc. 1999 WL 947992 (N.D. Cal. 1999) (emphasis added).

The United States Court of Appeals for the Eight Circuit recently ruled that a new trial was warranted in a product liability action as a result of the defendant manufacturer's failure to comply with its duty to inform the plaintiff of changes or additions in its medical expert testimony. Tenbarge v. Ames Taping Tool

Systems, Inc. 190 F. 3d 862 (8th Cir. 1999).

In that case, the Court of Appeals held that defendant's medical expert failure to comply with its duty to inform the installer of changes or additions in the expert's testimony as to the cause of the plaintiff's medical condition, which was the key issue in that case, denied plaintiff the opportunity to develop his cross-examination of the medical expert or to present additional expert witnesses to counter the new conclusions, resulting in fundamental unfairness, warranting the grant of a new trial, Id., at 865.

In evaluating appropriate remedial action under the 1993 amendments to Rules 26 and 37, Courts of Appeals in other circuits have articulated a standard wherein the burden is placed on the perpetrator, not the victim of the abusive trial tactics. These courts have hindsight in this area should favor held in circumstances where there has been a breach of discovery rules and discovery orders, any "uncertainties attending the application of the party that was denied discovery because parties ought not to benefit from their own mis-, mal- or nonfeasance."Klonoski v. Mahlab 156 F. 3d 255 at 274, 275 (1st Circuit 1998). It appears that the general trend in the other circuits favors a legal standard which imposes on the beneficiary of evidence not disclosed prior to trial in violation of Rule 26, the burden of a rebuttable presumption that the evidence was prejudicial.

The conflict presented by the instant cause, and the opinions set forth in other circuits needs to be harmonized, so that the district courts are freed from any uncertainty as to the proper standards and applications of the rules, and so that the toothless harmless error standard set forth by the Court of Appeals in the opinion at bar not give aid, comfort, and precedential authority to practitioners of abusive litigation tactics.

As one court has noted, "discovery of expert opinion must not be allowed to degenerate into a game of evasion." Tenbarge v. Ames Taping Tool Systems, Inc. 190 F. 3d 862 (8th Cir.

1999).

It is well settled that the purpose of modern discovery procedure is to narrow the issues, to eliminate surprise, and to achieve substantial judgment. Id., quoting Mawby v. United States, 999 F. 2d 1252, 1254 (8th Cir. 1993).

The instant opinion engages in a fine parsing of the law surrounding civil contempt, and finds, that lying in the course of trial proceedings by an expert witness sworn to tell the truth, does not necessarily "obstruct justice" and without more is not contempt of court. Slip Op. at 52. Yet the instant opinion, and the trial court's ruling relative to the testimony of Dr. Eager misses the mark, rendering the trial court's decision to deny Plaintiff's Rule 60(b) motion, and the appellate court's affirmance erroneous as a matter of law, as the totality of the evidence before the trial court and the appellate court was such as to show that through Defendant's misconduct, incompetent and highly prejudicial testimony was entered into evidence, compromising the integrity of the jury's fact finding role, thereby depriving Plaintiff of his Seventh Amendment rights to a jury trial.

The instant opinion, left undisturbed, will serve to encourage judicial free for alls in the guise of trials. Respectfully, such a result would be inimical to the purpose of the Federal Rules of Civil Procedure, and would serve to impede the orderly conduct of our federal courts, thereby undermining the due process rights of all litigants.

CONCLUSION

For the above and foregoing reasons, Plaintiff requests that this Court reverse the Opinion of the Court of Appeals, order a new trial, and remand this cause to the District Court for further proceedings consistent with the Court's Order. In the alternative, Plaintiff requests that this Honorable Court reverse and remand this cause for proceedings consistent with its Order, or in the

alternative, grant Plaintiff whatever relief it deems just and proper.

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 19, 1999
Before
Hon. William J. Bauer, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*

TERRY JONES,
Plaintiff-Appellant,

Nos. 96-1376, 97-1938,

and 98-1487 **v.**

LINCOLN ELECTRIC CO., HOBART BROTHERS INC., WESTINGHOUSE ELECTRIC CORP., AIRCO/THE BOC GROUP, INC., AND TELEDYNE INDUSTRIES, INC.,
Defendants-Appellees
and
Dr. THOMAS W. EAGAR,
Respondent-Appellee

Appeal from the United States Court for the Northern District of Indiana,
Hammond Division.
No. 95 C 83
Rudy Lozano, Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause, no judge in active service has requested a vote thereon, and all of the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.

Terry JONES, Plaintiff-Appellant,

v.

LINCOLN ELECTRIC CO., Hobart Brothers Inc.,
Westinghouse Electric Corp.,
Airco/The BOC Group, Inc., and Teledyne Industries, Inc.,
Defendants-Appellees,
and
Dr. Thomas W. Eager, Respondent-Appellee.

Nos. 96-1376, 97-1938, 98-1487.

United States Court of Appeals,
Seventh Circuit.

Argued Nov. 2, 1998.

Decided July 29, 1999.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division. No. 95 C 83--Rudy Lozano, Judge.

Before CUMMINGS, [FN*] BAUER, and KANNE, Circuit Judges.

KANNE, Circuit Judge.

*1 We have consolidated for decision three appeals arising from Terry Jones's product liability suit against Hobart Brothers Company, Lincoln Electric Company, Airco/The BOC Group, Westinghouse Electric Corporation, Inco Alloys International, Incorporated, and Teledyne, Incorporated, (collectively, "Defendants"), all of whom are various manufacturers and distributors of welding rods. Jones sought to hold Defendants

liable for neurological injuries he allegedly sustained as a result of his exposure to manganese present in fumes emitted from Defendants' welding rods that he used during the course of his employment as a welder. Jones claimed that Defendants were negligent in the manufacture and distribution of the welding rods because they either knew or should have known of the dangers and hazards associated with the breathing of manganese in welding fumes and that Defendants failed to take reasonable precautions against and failed to provide adequate warnings of the potential harm posed by these fumes. Jones also claimed that Defendants' welding rods were unreasonably dangerous, and therefore Defendants were strictly liable for his injuries, because they failed to properly warn him of the risks associated with the use of their rods.

Defendants denied that Jones's neurological condition was caused by his exposure to welding rod fumes, maintaining instead that Jones suffered from idiopathic Parkinson's disease--a disease unrelated to manganese overexposure. Defendants also denied the remaining allegations made by Jones. The case was tried to a jury and the jury returned a verdict in favor of Defendants and against Jones on all counts. [FN1]

Jones filed a timely motion for a new trial under Federal Rule of Civil Procedure 59, which the district court denied. Jones then filed his first appeal from the final judgment entered in favor of Defendants. In this first appeal, Jones argues that the district court erred in admitting certain testimony from Dr. Thomas W. Eager, one of Defendants' expert witnesses, and erred in overruling objections to allegedly improper statements made by defense counsel during his closing argument.

A little more than eleven months after the jury verdict, and while Jones's first appeal was still pending, Jones filed two additional post-trial motions: a motion for relief from final judgment pursuant to Federal Rule of Civil Procedure 60(b)(2); and a

motion for rule to show cause why Dr. Thomas W. Eager should not be held in contempt of court. Both motions were based on "newly discovered" evidence that allegedly showed that Dr. Eager provided false testimony at trial. The district court denied both of these motions. Jones's second and third appeals are from those orders.

For the reasons set forth in the following opinion, we affirm the orders and decisions of the district court.

I. History

Terry Jones worked as a journeyman electrician and welder for approximately twenty-eight years, beginning in 1964 and ending in 1992, when his neurological disorder progressed to the point that he could no longer effectively weld. Over the course of his welding career, Jones worked for a number of companies at several different job sites, with most of his work taking place inside large steel mills. Jones estimated that, on average, he spent half of his work day performing electrical tasks and the other half welding.

*2 Jones welded using a method commonly known as "arc welding." This process of welding utilizes a consumable steel welding rod connected through a rod holder by a wire to one pole of an electric power supply. Another wire extends from the opposite pole of the power supply to the two pieces of the base metal to be welded together. When the welding rod is brought into contact with the intersection of the two pieces of metal to be joined, the electrical circuit is completed creating an electric "arc" between the tip of the welding rod and the pieces of metal. The electricity flows through the arc producing the very bright light commonly associated with welding and generating tremendous heat sufficient to melt the tip of the steel welding rod. The melting metal from the welding rod drips off the end of the rod

and falls into or across the joint to be welded. At the same time, the heat generated by the arc melts some of the base metal of the area of joint as well, forming a pool of liquid steel. As the welder moves the welding rod along the joint, the earlier combination of weld metal and base metal cools and solidifies, leaving a weld.

Throughout his welding career, Jones used welding rods manufactured and or distributed by Defendants. The welding rods typically used by Jones were made of mild steel, which consists predominantly of iron, but also contains a small amount of manganese, among other elements and compounds. Manganese is a naturally occurring element and is an essential ingredient to the proper manufacture of steel because it prevents steel from cracking and falling apart when it is manufactured.

When the welding process melts both the welding rod and the base metal, the heat of the arc vaporizes a small percentage of the steel and emits "welding fumes." A small amount of the fumes generated by the burning of a mild steel welding rod consists of manganese. Although Jones worked primarily in large steel mills, he welded in a variety of different work environments and in a number of different welding positions that exposed him to varying amounts of welding fumes, with the end result being that he was frequently forced to breathe the fumes, which included manganese, produced by Defendants' welding rods. Although Jones testified that during many of his welding projects a significant amount of welding fumes would tend to accumulate and hover about his head, he indicated that he ordinarily did not take any special precautions to ventilate his work area as he assumed that the ventilation was adequate.

Manganese is not only critical to the production of steel, but it is also essential for human life. The human body needs a certain amount of manganese in order to function properly especially in relation to carrying out its chemical functions. Too much manganese within the body, however, can be toxic, causing injury to the brain or the rest of the nervous system and can lead to the

onset of a form of Parkinsonism. Parkinsonism is a medical term used to describe a disease typified by a group of signs and symptoms similar to that seen in Parkinson's disease, a neurological disorder that is characterized by the causing of abnormal or slow bodily movements. According to the medical testimony introduced at trial, a person suffering from a form of Parkinsonism will typically exhibit some or all of four general symptoms that are common to Parkinson's disease. The first symptom is a resting tremor, meaning an abnormal shaking movement of a person's body part while the person is at rest. The second symptom is rigidity, meaning a stiffness or resistance to movement in the limbs. When a physician tries to move the patient's arms or legs, the physician can feel a resistance to the movement. The third symptom is called bradykinesia or slowness of movement. A patient will experience slowness or difficulty in carrying out and initiating all kinds of movements. The fourth symptom usually common to Parkinsonism is a difficulty in maintaining one's balance or the loss of postural reflexes.

*3 Although there are several different forms or types of Parkinsonism, the two types relevant to this case are idiopathic Parkinson's disease and manganese-induced Parkinsonism or "manganism." Although occasionally described at trial as a type of Parkinsonism, idiopathic Parkinson's disease is basically Parkinson's disease without a known cause. A person suffering from this disease will exhibit most, if not all, of the general Parkinsonian symptoms described above as the disease progresses. Manganism, by contrast, is a medical term used to describe a neurological disease similar to idiopathic Parkinson's disease that is caused by overexposure to manganese. The two are distinct medical conditions with manganism usually marked by the absence of some of the above- mentioned general symptoms and the presence of other "atypical" features normally not found in patients suffering from idiopathic Parkinson's disease. Idiopathic

Parkinson's disease afflicts approximately one to two percent of the population over the age of fifty, although some patients begin to develop the disease under fifty years of age. Manganism, on the other hand, is quite rare with only a few documented cases in the United States. Jones believes that he suffers from manganism and that he developed this disease through his exposure to manganese contained in welding fumes given off by Defendants' welding rods.

Jones first began to manifest symptoms of a neurological injury in 1987, when, at the age of forty-seven, he noticed that his left hand had begun to shake involuntarily. Soon thereafter, Jones went to see a neurologist, Dr. Young Il Ro, who operated a private medical practice in Chicago Heights, Illinois. Jones specifically complained to Dr. Ro that he was experiencing a tremor and a loss of dexterity in his left hand and that he felt cracks in his left shoulder. Jones indicated that he had been experiencing these problems for about eight months and that they were causing him difficulty at work. During the course of his examination, Dr. Ro also noticed that Jones exhibited some muscle stiffness in his upper left arm and face. Although Dr. Ro found that Jones appeared to exhibit signs of a minor atypical tremor, he diagnosed Jones as suffering from idiopathic Parkinson's disease. At that time, Dr. Ro prescribed sinemet, a medication commonly given to patients suffering from idiopathic Parkinson's disease. Dr. Ro met with Jones two months later, and Jones indicated that the medication made him feel better.

In 1988, Jones was referred to Dr. Kathleen Shannon, another neurologist, by a colleague who believed that Jones might be a good candidate for a study being conducted that sought to determine whether a certain drug would be effective in slowing down the progression of idiopathic Parkinson's disease. Dr. Shannon's role in that study was to evaluate potential candidates to ensure that they had idiopathic Parkinson's disease. In explaining how she evaluated whether a patient suffered from

idiopathic Parkinson's disease as opposed to some other form of Parkinsonism, Dr. Shannon testified that she would first determine whether the patient had at least two of the general Parkinsonian symptoms--that is, the typical features associated with idiopathic Parkinson's disease. Then she would look to ensure that the patient did suffer from an "atypical" Parkinsonism, a disorder, like manganism, by examining the patient for atypical symptoms commonly associated with those atypical disorders but not idiopathic Parkinson's disease.

*4 In the course of her neurological examination of Jones, Dr. Shannon observed that Jones exhibited a number of the general symptoms typical of idiopathic Parkinson's disease. He had a mild resting tremor in his hand, some rigidity in his neck, arms, and left leg, and slowness of movement in his left side. Significantly, Dr. Shannon found no atypical features. Based on her examination of Jones and her evaluation of his medical history, [FN2] Dr. Shannon diagnosed him with idiopathic Parkinson's disease and enrolled him in the study. Dr. Shannon examined Jones on several subsequent occasions during the course of the study and her diagnosis remained unchanged.

In the Spring of 1989, Jones saw yet another neurologist, Dr. Leslie Galen, Jones's treating physician in Las Vegas, Nevada. [FN3] Dr. Galen examined Jones several times during a period of approximately four years. Dr. Galen also prescribed anti-Parkinson's disease medications, including sinemet. In treating Jones, Dr. Galen noticed that these medications initially improved Jones's overall condition, although he still had a resting tremor in his left hand, and that, during the course of Dr. Galen's treatment of Jones, he noticed no significant negative change in Jones's symptoms. Although unaware of Jones's prior exposure to manganese, Dr. Galen also concluded that Jones suffered from idiopathic Parkinson's disease based on his examination of Jones

and Jones's response to treatment.

In 1992, Jones filed the instant suit against Defendants, alleging that the manganese contained in the fumes generated by their welding rods caused his neurological injuries. Jones asserted claims of negligence and strict liability, alleging that Defendants knowingly manufactured and sold welding rods containing manganese even though they knew of the dangers and hazards associated with manganese in welding fumes. Despite this knowledge, Jones submitted that Defendants failed to take reasonable precautions against the readily foreseeable harm that would be caused by their products and failed to provide adequate warnings and instructions on how to safely use their allegedly toxic welding rods.

The central issue at trial, however, was whether Jones suffered from manganism or idiopathic Parkinson's disease. Defendants vigorously contested Jones's assertion that he suffered from manganism brought on by exposure to their welding rods. In support of their theory that Jones suffered from idiopathic Parkinson's disease that was causally unrelated to any manganese exposure from their products, Defendants introduced testimony from Jones's treating physicians, all of whom had diagnosed him with idiopathic Parkinson's disease, and the testimony from a paid medical expert, Dr. Charles Olanow, [FN4] who concurred with their assessment based upon his own examination of Jones and a review of Jones's medical and work history.

According to Dr. Olanow, an experienced neurologist can distinguish whether a patient suffers from idiopathic Parkinson's disease or manganism by conducting a clinical examination of the patient focusing on the symptoms exhibited and looking at the patient's response to certain medications. Dr. Olanow explained that idiopathic Parkinson's disease and manganism are generally thought to cause cell damage in distinct parts of the brain. Dr. Olanow noted that the part of the brain most commonly affected by idiopathic Parkinson's disease is the substantia nigra; whereas

manganism primarily affects two other parts of the brain known as the striatum and globus pallidus. Because the two diseases tend to affect different parts of the brain, a particular patient's response to certain medications is a strong indicator as to the type of Parkinsonism afflicting the patient. Dr. Olanow testified that the cells in the substantia nigra produce dopamine, a chemical through which messages are sent to certain other parts of the brain, including the striatum. Idiopathic Parkinson's disease reduces the number of cells in the substantia nigra which causes a corresponding reduction in the level of dopamine in the brain. This loss of dopamine brings about the symptoms commonly associated with idiopathic Parkinson's disease. In treating a patient suspected of suffering from idiopathic Parkinson's disease, a physician can replace the loss of dopamine with a dopamine substitute, such as sinemet, and the patient usually will respond favorably. On the other hand, a patient with damage to the globus pallidus or striatum, as is generally the case with manganism, typically will not have a beneficial response to dopamine replacement therapy because dopamine does not have any significant impact on the ability of the striatum or globus pallidus to receive messages. As a result, increasing the dopamine level of a patient suffering from manganism tends not to alleviate any Parkinsonian symptoms exhibited because that disorder does not affect the brain's ability to produce dopamine. Jones's favorable response to sinemet was one of the bases for Dr. Olanow's opinion that Jones has idiopathic Parkinson's disease.

*5 In addition to a patient's response to medication, the particular symptoms exhibited by the patient are often a strong indicator as to whether that patient has idiopathic Parkinson's disease or manganism. Although idiopathic Parkinson's disease and manganism often share some of the four general symptoms associated with Parkinsonism, Dr. Olanow testified that certain symptoms are more commonly attributed to one or the other

disease. Dr. Olanow identified those symptoms strongly indicative of idiopathic Parkinson's disease as including the presence of a resting tremor, rigidity, asymmetry (meaning that the tremors begin on one side of the body rather than both), and slowness. Patients suffering from manganism, on the other hand, are usually found not to have a resting tremor. Instead, manganism tends to manifest certain "atypical" features not normally found in idiopathic Parkinson's disease, such as speech and prominent early gait disturbances, and myoclonic syndrome, which is an involuntary muscle contraction that can lead to difficulty in walking and a facial grimace.

Dr. Olanow examined Jones in July 1993. Dr. Olanow indicated that during the course of the examination, Jones told him about the progression of his injuries, beginning with the resting tremor in his left hand and leading to impaired coordination and stiffness on his left side. Jones also informed Dr. Olanow that he had been taking sinemet and that he believed the medication had helped him substantially. When conducting the neurological part of the examination, Dr. Olanow observed that Jones's speech was slightly reduced, his face had a staring quality to it with a decreased amount of blinking, he had a resting tremor in his left hand, and he exhibited signs of stiffness and reduced movements on the left side of his body. Dr. Olanow also observed that Jones walked quite well, although he had reduced arm swing on his left side, he had relatively normal postural stability, and that overall his movements were quite "slow"--all observations that were consistent with a finding of idiopathic Parkinson's disease. Dr. Olanow also noticed that Jones's Parkinsonian symptoms became more pronounced over the course of the examination, which indicated that the dopamine replacement medication had begun to lose its effectiveness, causing his Parkinsonian features to become more prominent. Dr. Olanow found no evidence of myoclonism or any noticeable presence of any other "atypical" feature that would suggest manganese intoxication. Based on

these observations, Dr. Olanow concluded that Jones suffered from idiopathic Parkinson's disease.

In support of his theory that he actually suffered from manganism, not idiopathic Parkinson's disease, and that the manganese exposure from Defendant's welding rods caused his neurological injuries, Jones relied on the testimony of his paid expert medical witness, Dr. Harold Klawans. [FN5] Dr. Klawans testified that it is not possible to determine whether a patient suffers from idiopathic Parkinson's disease or manganism by looking solely at the patient's clinical symptoms. Instead, Dr. Klawans believed the foremost and determinative factor in assessing whether a patient suffers from idiopathic Parkinson disease or manganism is the patient's history--whether the patient has a history of manganese exposure.

*6 Dr. Klawans testified that a welder, like Jones, who is exposed to welding fumes containing manganese and breathes in those fumes, is at risk of developing manganism because the manganese from the welding fumes is absorbed by the lungs when the welder inhales the fumes. The manganese then crosses from the lung into the bloodstream with some of the manganese making its way up into the brain where it causes neurological damage. Once in the brain, Dr. Klawans testified that manganese can damage cells in a number of areas including not only those areas typically damaged by manganism, namely the striatum and the globus pallidus, but also the substantia nigra, the area Defendants' expert identified as usually being affected only by idiopathic Parkinson's disease. Thus, Dr. Klawans suggested that both diseases could cause a loss of dopamine in the brain and, therefore, a patient with manganism could respond favorably to dopamine replacement therapy. For that reason, Dr. Klawans also testified that he would prescribe sinemet or a similar dopamine replacement medication to a patient suffering from manganism.

On cross examination, however, Dr. Klawans acknowledged that

the two diseases tend to affect different parts of the brain, with idiopathic Parkinson's disease typically damaging the substantia nigra thereby causing the general signs and symptoms common to that disease. Dr. Klawans also agreed that manganese more often damages the globus pallidus and striatum than it does the substantia nigra, with the result being that patients with manganism usually will respond less well to dopamine replacement therapy than patients suffering from idiopathic Parkinson's disease. In addition, while Dr. Klawans testified that a patient afflicted with manganism could exhibit some or all of the symptoms commonly seen in a patient suffering from idiopathic Parkinson's disease, he acknowledged that certain other symptoms, the "atypical" features described above, more often appear in patients suffering from manganism.

Dr. Klawans examined Jones once, in September 1992, at the behest of Jones's counsel. The only "atypical" symptom Dr. Klawans found during his examination of Jones was myoclonic syndrome (the abnormal, involuntary jerking of muscles)--a feature that none of the other neurologists who examined Jones found to be present. Undercutting the significance of the presence of this symptom, Dr. Klawans indicated that long-term dopamine replacement therapy could cause myoclonus, although Dr. Klawans did not believe that to be true in Jones's case because of the absence of other dopamine-induced symptoms one would normally expect to find if the myoclonus was caused by dopamine replacement therapy. In any event, based on his neurological examination, the presence of myoclonus, and Jones's history of manganese exposure from Defendants' welding rods, Dr. Klawans concluded that Jones suffered from manganism.

Despite diagnosing Jones with manganism, Dr. Klawans observed that Jones exhibited all of the symptoms common to idiopathic Parkinson's disease: the resting tremor; impaired postural balances; stiffness and rigidity; bradykinesia; an absence of any prominent gait-disturbance; a favorable response to

dopamine replacement therapy; and normal progression of the disease. In fact, with the exception of myoclonus, every sign and symptom Dr. Klawans found was consistent with a finding that Jones suffered from idiopathic Parkinson's disease and Dr. Klawans acknowledged that his diagnosis of manganism was premised entirely on the presence of myoclonus and Jones's work history. With respect to Jones's work history and prior exposure to manganese, Dr. Klawans's testimony revealed that he knew little more than that Jones had been exposed to manganese during the course of his career as a welder--he indicated that he did not know the percent of manganese in the welding rods used by Jones, the permissible exposure limit for manganese, any details of the environments in which he welded, or the amount of manganese required in welding fumes to afflict a person with manganism.

*7 Although the bulk of the trial focused on the issue of whether Jones actually suffered from manganism, the parties also contested whether manganese, in the form it takes in the mild steel welding fumes generated by Defendants' welding rods, could cause the type of neurological injuries claimed by Jones. Jones asserted that the welding fumes emitted by the burning of Defendants' welding rods caused him to develop manganism. In support of that theory, Jones offered the testimony Dr. Klawans who testified that medical research showed that manganese contained in welding fumes could lead to the onset of manganism in welders and that it was his opinion that Jones developed manganism as a result of his exposure to the manganese generated by Defendants' welding rods.

Defendants offered contrary evidence suggesting Jones's manganese exposure from their welding rods was too insignificant to actually cause manganism. Dr. Thomas Eager, a professor of materials engineering and the head of the Department of Material Science and Engineering at the Massachusetts Institute of

Technology, testified for the Defendants as an expert witness in metallurgy. Dr. Eager provided testimony at trial on a number of subjects, including the history and uses of welding, a description of how the welding process works and how welding fumes are generated, the chemical composition of welding fumes, proper ventilation during welding, and an estimate of how long a person who is welding is actually exposed to welding fumes. Dr. Eager has an extensive background in welding and testified that it was his expert opinion that Jones's manganese exposure from welding with Defendants' welding rods would have been less than the industry recommended maximum manganese exposure levels ("threshold limit values") given the work environments in which Jones worked, the type of welding he engaged in, the form of the manganese in the welding fumes, and the amount of time he actually spent welding.

On appeal, Jones argues that the district court improperly admitted portions of Dr. Eager's testimony, and as a result, he is entitled to a new trial. Specifically, Jones challenges the admission of Dr. Eager's testimony regarding (1) his role in research studying the effects of welding fumes on the lungs of animals and the results of that research ("Joint Research") and (2) an epidemiological study of welders at Caterpillar ("Caterpillar Study").

With respect to Dr. Eager's testimony regarding the Joint Research, Dr. Eager testified that the form of the manganese in the welding fumes is different in chemical composition than naturally occurring manganese. The manganese takes on this different form by combining with other elements given off by the melting of the mild steel and, according to Dr. Eager, this causes the manganese contained in welding fumes to have a different reactivity with the lungs than pure manganese. Defense counsel then asked Dr. Eager whether he believed this would have an impact on the body's ability to absorb the manganese. At this point, Jones objected on the basis that this line of questioning

sought testimony from Dr. Eager that was outside his expertise as a metallurgist. The district court sustained the objection subject to defense counsel laying a proper foundation.

*8 In an attempt to lay a foundation for this testimony, Dr. Eager testified, over several objections, that he conducted "joint research" studying the effect of welding fumes in the lungs of laboratory animals with Dr. Joseph Brain, a professor at the Harvard University School of Public Health, and Dr. Gael Ulrich, a professor of chemical engineering at the University of New Hampshire. Dr. Eager indicated that he worked with Dr. Brain for the last three to four years, that they had discussed their research activities with each other, and that they had published papers together and reached certain conclusions from their Joint Research. After this testimony was elicited, defense counsel asked Dr. Eager about the conclusions the Joint Research reached regarding the form of the manganese in the welding fumes and the ability of the body to absorb manganese in that form. Jones again objected, arguing that each of the professors brought their own expertise to the research and that Dr. Eager sought to testify about medical matters that were outside his expertise. Jones complained that the medical expert, Dr. Brain, was not present to discuss the conclusions reached regarding the body's ability to absorb manganese and the basis for those conclusions. The district court overruled Jones's objection, concluding that the professors discussed their joint research and, in essence, taught one another their particular areas of expertise. On that basis, the district court concluded that Dr. Eager was qualified to testify as to the conclusions reached by the Joint Research.

Dr. Eager then proceeded to testify that the Joint Research concluded that there was no difference between placing welding fumes or saline solution or non-toxic iron oxide into the animal's lungs. Defense counsel then asked Dr. Eager whether their

research led to any conclusions regarding the toxicity of manganese in welding fumes. Jones again objected on the ground that the question called for testimony beyond Dr. Eager's expertise. After Dr. Eager explained that the conclusions were drawn by all three professors after discussing the various disciplines involved in reaching the conclusions, the district court allowed Dr. Eager to proceed and he testified that there was no measurable effect of welding fumes containing manganese on the lungs.

Jones also objected to testimony elicited from Dr. Eager regarding the Caterpillar Study. On cross-examination, Jones asked Dr. Eager whether he had ever encouraged the American Welding Society, an organization that seeks to promote the knowledge and science of welding, or any of the companies that are members of that society, to conduct an epidemiological study to determine the health effects of welding fumes on welders. Dr. Eager testified that he had not encouraged such a study. On redirect examination, Dr. Eager stated that he did not believe an epidemiological study was required because one had already been completed, namely, the Caterpillar Study, and that the Caterpillar Study had showed that welders did not experience any more diseases or health effects than non-welders working at Caterpillar. Jones did not immediately object to the admission of this testimony at the time it was offered.

*9 At the close of Dr. Eager's testimony, which concluded the testimony for the day, Jones made an oral motion to strike Dr. Eager's testimony regarding the Joint Research on the ground it was outside his expertise and Dr. Eager's testimony regarding the Caterpillar Study on the ground that it was not disclosed to Jones prior to trial in accordance with Federal Rule of Civil Procedure 26. With respect to the Joint Research, the district court declined to reconsider its prior rulings. Turning to Dr. Eager's testimony regarding the Caterpillar Study, the district court determined that

Jones had waived his Rule 26 objection because he failed to object to the testimony at the time it was offered or immediately thereafter. The following morning, Jones submitted a written motion to strike, renewing his objections to the admission of both portions of Dr. Eager's testimony. He argued that the testimony went beyond Dr. Eager's expertise and that Defendants had failed to disclose, in accordance with Rule 26, that Dr. Eager would be relying on the Joint Research and the Caterpillar Study at trial. The district court denied that motion on the same basis it had denied the prior oral objections.

The jury returned a verdict in favor of Defendants on all counts alleged in the complaint. Jones then filed his first appeal, arguing that the district court erred in overruling his objections to the admission of Dr. Eager's testimony regarding both the Caterpillar Study and the Joint Research. In addition, Jones argues that the district court erred in overruling his objections to defense counsel's improper closing argument. Jones alleges that defense counsel improperly argued during his closing statement that Jones and his attorneys were trying to "trick the jury" into finding in favor of Jones.

While that appeal was pending, Jones claimed that he uncovered "new" evidence which shows that Dr. Eager's testimony with regard to the Joint Research and the Caterpillar Study was false. Specifically, Jones alleged that Dr. Eager testified falsely with respect to the facts that formed the basis for the district court's ruling that he had the necessary qualifications to provide testimony on the toxicity of manganese in welding fumes and the ability of the body to absorb manganese in that form, the conclusions reached by the Joint Research, and the conclusions reached by the Caterpillar Study. Based on this allegedly false testimony, Jones moved for a new trial pursuant to Federal Rule of Civil Procedure 60(b)(2) and filed a motion for rule to show cause why Dr. Eager should not be held in contempt of court. The district court denied both motions.

The district court denied Jones's motion to hold Dr. Eager in contempt because Jones failed to show that Dr. Eager's allegedly false testimony obstructed the court's authority to conduct orderly proceedings. Without reaching the issue of whether Dr. Eager's testimony was false, the court concluded that the nature and purpose of civil contempt did not warrant applying the contempt power to a witness who merely provided false testimony absent some showing that the false testimony obstructed the court's ability to conduct the trial. Jones's second appeal is from that order.

*10 The district court denied Jones's Rule 60(b)(2) motion concluding that: (1) certain portions of the "newly discovered" evidence could have been discovered in time to move for a new trial under Rule 59(b) and therefore this evidence was not "new" within the meaning of Rule 60(b)(2) and (2) the remaining challenged testimony did not materially mischaracterize the purported truth of the underlying matters. Furthermore, the court concluded that Jones was not entitled to Rule 60(b)(2) relief in any event because Jones failed to establish that a new trial without Dr. Eager's allegedly false testimony would probably produce a new result. Jones's third and final appeal is from that order.

II. Analysis

A. Jones Is Not Entitled To A New Trial On The Ground That The District Court Erred In Overruling His Objections To Certain Portions of Dr. Eager's Testimony

We first address Jones's arguments that the district court erred in overruling his objections to the portions of Dr. Eager's testimony regarding the Joint Research and the Caterpillar Study. In order to convince us that a new trial is warranted based on the admission of this testimony, Jones must satisfy three conditions. First, for those portions of the challenged testimony for which the

district court ruled that Jones's objection was untimely and, therefore, waived, Jones must show that he objected in a timely and proper manner before the district court. See United States v. Krankel, 164 F.3d 1046, 1052 (7th Cir.1998). Second, he must show that the district court abused its discretion in admitting the challenged testimony. See General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997). Third, he must show that any error made by the district court in admitting the evidence was more than harmless error by showing that the exclusion of this evidence probably would have produced a different outcome in the case. See Chapman v. California, 386 U.S. 18, 22-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

1. Dr. Eager's Testimony Regarding the Joint Research

Jones argues that the district court erred in permitting Dr. Eager to testify regarding the ability of the body to absorb manganese from welding fumes generated by mild steel welding rods, the toxicity of manganese contained in welding fumes, and the results of the Joint Research concerning the effect of manganese from welding fumes on lungs of animals, because Dr. Eager was not qualified under Federal Rule of Evidence 702 to offer an opinion on these matters. Because there is no colorable issue as to whether Jones timely objected to Dr. Eager's expertise and qualification to testify on these matters, [FN6] we turn directly to the issue of whether the district court erred in overruling his objections and admitting this testimony into evidence.

We review a district court's decision to admit expert testimony under an abuse of discretion standard. See General Elec. Co., 118 S.Ct. at 517; Krankel, 164 F.3d at 1052. "Trial judges have discretion in determining whether a proffered expert is qualified to testify," see Raymond v. Raymond Corp., 938 F.2d 1518, 1526 (7th Cir.1991), and, therefore, our review of the district court's determination of an expert's qualifications to testify is

necessarily deferential. However, in the present case, we are not wholly convinced that the district court exercised *proper* discretion in concluding that Dr. Eager was qualified to testify as to the challenged matters relating to the Joint Research.

*11 Rule 702 of the Federal Rules of Evidence sets the standard governing the admissibility of expert testimony and that Rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed.R.Evid. 702. Pursuant to Rule 702, a witness may offer an expert opinion only if he or she draws on some special "knowledge, skill, experience, training, or education" to formulate that opinion. Id. However, "the opinion must be an expert opinion (that is, an opinion informed by the witness' expertise) rather than simply an opinion broached by a purported expert." United States v. Benson, 941 F.2d 598, 604 (7th Cir.1991) "Whether a witness is qualified as an expert can only be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony." Carroll v. Otis Elevator Co., 896 F.2d 210, 212 (7th Cir.1990).

The challenged testimony offered by Dr. Eager regarding the Joint Research concerns matters that are most aptly classified as medical or biological in nature given that Dr. Eager was asked to testify as to the toxicity of manganese in manganese fumes and the lung's ability to absorb manganese from those fumes. However, Dr. Eager's formal education and experience lie in the field of material science and metallurgy and he was offered as an expert in metallurgy at trial. He has a Bachelor of Science degree in Metallurgy and Material Science from MIT and a Doctorate in

Metallurgy from the same institution. While Dr. Eager undoubtedly is a very intelligent individual, he is not a medical doctor nor is there any indication in the record that suggests that he has any experience in assessing the toxicology or other health effects of manganese on the body aside from his participation in the Joint Research with Dr. Brain. Indeed, Dr. Eager acknowledged on cross-examination that he was not a toxicologist and that toxicology and how certain substances are absorbed into the body were areas that were outside of his expertise. It stands to reason then that the underlying basis for the medical conclusions to which Dr. Eager testified was derived primarily, if not completely, from Dr. Brain's expertise and that these conclusions were rooted in medical knowledge and training which Dr. Eager did not have. As such, we believe that Dr. Eager lacked sufficient expertise to testify about the conclusions reached by the Joint Research, and, therefore, the district court should have barred him from testifying on these matters. See, e.g., United States v. Hirschberg, 988 F.2d 1509, 1514 (7th Cir.1993) ("Expert opinion is gained from a 'special skill, knowledge, or experience,' and is a reasoned decision drawn from the witness' expertise." (quoting United States v. Benson, 941 F.2d 598, 604 (7th Cir.1991))); United States v. Kladouris, 964 F.2d 658, 670 (7th Cir.1992) (affirming district court's ruling that a proffered witness's lack of training in chemistry prevented him from testifying as an expert on the significance of the presence of chemicals at the scene of the fire). Furthermore, to the extent that Dr. Eager was merely conveying Dr. Brain's conclusions with respect to the Joint Research, Dr. Brain, not Dr. Eager, would be the proper person to testify about those findings. [FN7]

*12 Moreover, while it is true that Rule 702 provides that a witness can be qualified as an expert without formal training or education by virtue of his or her experience, we do not believe that Dr. Eager's participation in the Joint Research is the kind of

experience that Rule 702 contemplates as the basis for qualifying an expert to testify at trial--i.e., extensive hands-on experience over a meaningful period of time during which a person develops a working expertise in a certain area. See, e.g., United States v. Tipton, 964 F.2d 650, 654 (7th Cir.1992). Dr. Eager testified that he was not involved in the day-to-day research of the Joint Research and it appears that his knowledge regarding the matters upon which he testified was derived mostly from periodic discussions with Dr. Brain and others involved in the research. We seriously doubt that the discussions that occurred between Drs. Eager, Brain, and Ulrich were comprehensive enough either in scope or detail to allow Dr. Eager to develop the expertise required by Rule 702 with respect to this testimony.

Nevertheless, even though the district court may have abused its discretion in admitting Dr. Eager's testimony on these matters, reversal is required, and a new trial is warranted under Rule 103(a), only if the error has affected "a substantial right of the party." See Fed.R.Evid. 103(a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected ...."); see also Fed.R.Civ.P. 61 ("No error in either the admission or the exclusion of evidence ... is ground for granting a new trial ... unless [the] refusal to take such action appears to the court inconsistent with substantial justice."). Accordingly, we will not reverse a jury verdict if an erroneous admission of expert testimony is harmless. See DeBiasio v. Illinois Cent. R.R., 52 F.3d 678, 685 (7th Cir.1995); see also Cook v. Hoppin, 783 F.2d 684, 691 (7th Cir.1986) ("The improper admission of evidence provides a basis for granting a new trial only if the error is prejudicial."). An error is considered to be harmless if it did not contribute to the verdict in a meaningful manner. See Chapman, 386 U.S. at 22-24; see also DeBiasio, 52 F.3d at 685 ("An erroneous evidentiary ruling is harmless and 'does not affect substantial rights unless there is a significant chance that it has affected the result of the trial.' "

(quoting Walton v. United Consumers Club, Inc., 786 F.2d 303, 313 (7th Cir.1986))). After careful review of the record, we conclude that the exclusion of Dr. Eager's testimony relating to the Joint Research would most likely not have resulted in a jury verdict in Jones's favor; thus, any error in admitting Dr. Eager's testimony was harmless. We reach this conclusion for three reasons.

*13 First, the dispositive issue at trial was whether Jones suffered from idiopathic Parkinson's disease, which the medical evidence at trial showed to be causally unrelated to gross manganese exposure, or manganism. Jones's theory of the case was that he suffered from manganism and that the manganese contained in welding fumes emitted from Defendants' welding rods led to the onset of his manganism. The testimony with which Jones takes issue relates to whether the manganese content of welding fumes is sufficient to cause manganism. However, in order to prevail at trial, Jones had to prove, first and foremost, that he actually suffered from manganism. Evidence that clearly shows that Jones did not suffer from manganism in the first place substantially diminishes the relative importance of testimony regarding whether welding fumes emitted from Defendants' products could have caused Jones to develop that disorder.

The overwhelming medical evidence at trial indicated that Jones suffers from idiopathic Parkinson's disease rather than manganism. Both Defendants' medical expert, Dr. Olanow, and all of Jones's own treating physicians diagnosed Jones with idiopathic Parkinson's disease. Although a diagnosis of idiopathic Parkinson's disease, by definition, means Parkinson's disease without a known cause, the testimony of Dr. Olanow and Jones's treating physicians either expressly or implicitly ruled out manganese exposure as the originating cause of Jones's neurological injury. Both Dr. Olanow and Dr. Shannon explained that manganism and idiopathic

Parkinson's disease are distinct medical conditions that generally affect different parts of the brain. While the two conditions may have similar symptoms, the medical testimony introduced by both Defendants and Jones clearly showed that each disorder also has unique symptoms. Dr. Olanow and the treating physicians testified that Jones exhibited those symptoms consistent with idiopathic Parkinson's disease and that there was a noticeable absence of "atypical" features suggesting that Jones suffered from manganism. They also testified that Jones responded favorably to dopamine replacement medication--another indicator that Jones was afflicted with idiopathic Parkinson's disease rather than manganism. Only Jones's paid medical expert, Dr. Klawans, reached the conclusion that Jones suffered from manganism and his testimony was substantially undermined during cross-examination when he acknowledged that manganism and idiopathic Parkinson's disease are distinct medical conditions, that the two disorders usually tend to damage different parts of the brain, that most patients with idiopathic Parkinson's disease respond favorably to dopamine replacement therapy while patients with manganism generally do not, and that patients suffering from manganism usually experience certain symptoms, such as myoclonus, that are not commonly seen in patients who suffer from idiopathic Parkinson's disease. Although Dr. Klawans concluded that Jones suffered from manganism, he testified that Jones had responded favorably to dopamine replacement therapy, that Jones had resting tremors, and that Jones exhibited no signs of prominent, early gait disturbance--all factors that would indicate that Jones suffered from idiopathic Parkinson's disease rather than manganism. Indeed, Dr. Klawans indicated that he based his diagnosis of manganism primarily on Jones's work history and the presence of myoclonus. However, none of the other physicians who examined Jones testified that he had myoclonus and Dr. Klawans acknowledged that dopamine-replacement therapy, which Jones had been undergoing

for four years by the time Dr. Klawans examined him, could account for the presence of myoclonus in Jones. When all of this medical evidence is taken into account and viewed in its proper light, we cannot accept Jones's implicit contention that the jury resolved the issue of whether he suffered from manganism in his favor and returned a verdict for Defendants only because it believed Dr. Eager's testimony that the manganese contained in welding fumes emitted from Defendants' welding rods did not have an appreciably negative health effect on animal lungs.

*14 Second, given the fact that Dr. Eager is not a medical doctor or toxicologist, and that Jones highlighted this fact during cross-examination, the jury is likely to have heavily discounted his testimony concerning the conclusions reached by the Joint Research, especially when Defendants did not enter into evidence any substantiating documents underlying the Joint Research. As such, Jones clearly conveyed Dr. Eager's lack of qualification to testify on these matters to the jury. "[G]enerally, the jury is intelligent enough, aided by counsel, to ignore what is unhelpful in deliberations." Benson, 941 F.2d at 605 (internal quotations and citation omitted).

Third, Jones introduced a number of studies and other documentary materials into evidence that suggested that manganese in welding fumes could lead to the onset of manganism and other health problems in welders. In addition, Jones's medical expert testified that, in his opinion, welding fumes containing manganese could cause manganism in welders by allowing manganese to enter into the lungs when the welder breathes in these fumes. Manganese may then be absorbed into the bloodstream and make its way into the brain where it may cause neurological damage. Thus, even if the jury accepted Dr. Eager's testimony as reliable, Jones introduced evidence to challenge those conclusions. In fact, we believe the jury likely placed little weight on Dr. Eager's testimony given that

Defendants placed warnings on their products that breathing welding fumes could be hazardous to the welder's health.

For these reasons, we conclude that any error by the district court in allowing Dr. Eager to testify as to the conclusions reached by the Joint Research was harmless.

2. Dr. Eager's Testimony Regarding the Caterpillar Study

Jones next argues that the district court erred in permitting Dr. Eager to testify about the conclusions reached by the Caterpillar Study with respect to the health effects of welding on welders because Defendants failed to disclose that Dr. Eager would be relying on that study at trial. Because Jones did not object to this testimony until the close of Dr. Eager's testimony, the district court considered the objection waived, concluding that a Rule 26 objection must be lodged contemporaneously with or immediately after the testimony is offered into evidence. Defendants now argue that Jones is barred from challenging the admission of Dr. Eager's testimony regarding the Caterpillar Study on appeal because he failed to object to this testimony in a timely manner before the district court.

To preserve an issue for appeal, Rule 103(a) of the Federal Rules of Evidence provides that a party objecting to the admission of evidence must make "a timely objection or motion to strike" before the district court. See Fed.R.Evid. 103(a). When a party fails to timely and properly object at trial to the admission of evidence, the party is deemed to have waived the issue on appeal. See Krankel, 164 F.2d at 1052; United States v. Wynn, 845 F.2d 1439, 1442 (7th Cir.1988).

*15 We note at the outset of our analysis that this is not the usual situation in which there is a total absence of an objection below or in which the movant raises an objection on appeal on a ground different from that presented to the district court--both of which

normally would constitute a waiver on appeal. See e.g., Williams v. Jader Fuel Co., 944 F.2d 1388, 1405 (7th Cir.1991); United States v. Field, 875 F.2d 130, 134 (7th Cir.1989). Jones objected to the admission of Dr. Eager's testimony regarding the Caterpillar Study before the district court on the ground he now asserts on appeal. The difficulty lies, however, in the fact that Jones did not lodge this objection until the close of Dr. Eager's testimony, which is when Jones professes he first became aware that Defendants had not disclosed that Dr. Eager would rely on this study at trial, rather than at the exact time that the testimony was introduced and admitted into evidence.

We are not entirely convinced that Jones should be deemed to have waived this issue on appeal. Contrary to Defendants' assertion, we do not believe it to always be the case that an objection has to be perfectly contemporaneous with the challenged testimony in order to satisfy Rule 103(a) and be considered "timely." Instead, an objection can still be deemed "timely" if it is raised within a sufficient time after the proffer of testimony so as to allow the district court an adequate opportunity to correct any error. How contemporaneous an objection must be to the challenged testimony in order to be considered "timely" under Rule 103(a) is a question of degree. Asking a court to strike testimony introduced at trial three weeks earlier would, by all accounts, be unreasonable--such an objection cannot be considered "timely" by any stretch of the imagination. On the other hand, petitioning the court to strike testimony offered by a witness at the close of that witness's testimony or prior to the start of the proceedings on the very next day when the witness was the last to testify on the preceding day, is a much closer question. In such a situation, the district court can certainly correct any error by issuing a limiting or curative instruction while the testimony is still relatively fresh in the mind of the jurors.

In the instant case we believe Jones's objection to Dr. Eager's testimony was sufficiently contemporaneous to be considered

"timely" under Rule 103(a). Cf. Deppe v. Tripp, 863 F.2d 1356, 1363 n. 10 (7th Cir.1988) (suggesting that a "nearly contemporaneous" objection made at the bench at the close of a party's closing argument would preserve the matter for appellate review because it would afford the trial court an opportunity to cure the claimed error through the use of a curative instruction). Jones objected immediately after the close of Dr. Eager's testimony and asked the Court to instruct the jury to disregard the challenged portions of Dr. Eager's testimony. This objection was presented to the district court at a time when the court could still correct any error. Furthermore, this was a rather protracted litigation extending over a period of years and involving a number of expert witnesses. Rule 103 should not be construed in such a narrow manner that courts cannot, or should not, recognize the exigencies of attempting to recall on a moment's notice whether a particular document or opinion has been disclosed in an expert's Rule 26 disclosure, especially when such evidence does not concern the expert's core testimony, as is the case here. In addition, we note that this is not a situation in which Jones sought to "sandbag" the district court by sitting on an alleged error for tactical reasons and raising the issue only when his case made a turn for the worse. The objection was sufficiently contemporaneous and, if anything, given the limited nature of Dr. Eager's testimony regarding the Caterpillar Study, more attention, not less, would have been drawn to Dr. Eager's testimony if the district court had ruled in favor of Jones and issued a limiting instruction--a consequence Jones was apparently willing to accept. For these reasons, we are inclined to find that Jones's objection to this testimony on Rule 26 grounds is not waived on appeal.

*16 Once it has been determined that a particular objection was timely, a litigant must then show that the district court abused its discretion in so ruling and that any error by the district court in admitting this evidence was more than harmless. We review a

district court's decision to admit or exclude evidence under Rule 26 for an abuse of discretion. See Cummins v. Lyle Indus., 93 F.3d 362, 371 (7th Cir.1996).

Rule 26(a)(2) requires a party to make certain pre-trial disclosures regarding expert testimony to opposing counsel including "a complete statement of all opinions to be expressed and the basis and reasons therefor ... [and] the data or other information considered by the witness in forming the opinions." Fed.R.Civ.P. 26(a)(2)(B). Subsections (a)(2)(C) and (e)(1) of that rule require that the expert's disclosure be supplemented if there are any additions or changes to the information previously disclosed.

Defendants failed to disclose to Jones that Dr. Eager would be relying on the Caterpillar Study at trial. As a general rule, if a party fails to disclose information in accordance with Rule 26(a), that party "shall not, unless such failure is harmless, be permitted to use as evidence at a trial any ... information not so disclosed." Fed.R.Civ.P. 37(c)(1). This sanction is "automatic and mandatory" unless the party can show that the violation "was either justified or harmless." Finley v. Marathon Oil Co., 75 F.3d 1225, 1230 (7th Cir.1996).

Because its ruling to allow Dr. Eager to testify regarding the Caterpillar Study was premised upon its conclusion that Jones had waived his Rule 26 objection, the district court did not reach the issue of whether it was proper to admit this testimony in light of Jones's Rule 26 objection. The fact that the district court did not reach this issue, however, does not affect our inquiry into whether the admission of Dr. Eager's testimony regarding the Caterpillar Study into evidence justifies granting Jones a new trial. Even if we assume that Defendants' non-disclosure was unjustified, we nevertheless conclude that it was harmless and any error by the district court in allowing Dr. Eager to testify about the Caterpillar Study at trial, if indeed there was any error, was harmless error that does not warrant a reversal.

Dr. Eager testified that the Caterpillar Study showed that welders did not experience any more diseases or health effects than non-welders working at Caterpillar. This testimony is more or less cumulative of his testimony regarding the Joint Research because both portions of his testimony conveyed the message to the jury that the manganese content in welding fumes generated by mild steel welding rods is too insignificant to cause manganism in welders. Accordingly, we conclude that the admission of Dr. Eager's testimony concerning the Caterpillar Study is harmless error for essentially the same reasons we found that the court's admission of Dr. Eager's testimony regarding the Joint Research was harmless: (1) the overwhelming medical evidence at trial strongly supported a finding that Jones suffered from idiopathic Parkinson's disease rather than manganism; (2) Dr. Eager was not qualified to testify as to the health effects of breathing welding fumes and the Defendants established this fact during cross-examination; and (3) Jones introduced a substantial amount of evidence to show that manganese in welding fumes could lead to the onset of manganism and other health problems in welders. Furthermore, we note that Dr. Eager's testimony regarding the Caterpillar Study, which itself was never introduced into evidence, was of a very limited scope as it consisted of a single question and answer.

*17 In sum, we conclude that any error by the district court in allowing Dr. Eager to testify both about the Joint Research and the Caterpillar Study was harmless error. Accordingly, Jones is not entitled to a new trial based on either of these grounds.

B. Remarks Made By Defense Counsel During Closing Argument Do Not Warrant A New Trial

Jones argues that he is entitled to a new trial because defense counsel's closing argument went beyond the bounds of acceptable

advocacy. During closing argument, defense counsel strenuously argued that the medical evidence introduced at trial showed that Jones suffered from idiopathic Parkinson's disease rather than manganism. After summarizing the various medical opinions of the neurologists offered at trial, defense counsel pointed out that all of them, except for Jones's paid medical expert, had diagnosed Jones with idiopathic Parkinson's disease, and defense counsel urged the jury not to lose sight of this evidence when it determined the issue of causation. With respect to that issue, defense counsel argued that, in order to hold Defendants liable for Jones's injuries, the jury must first determine whether Jones proved that he in fact suffers from manganism before it turns to the issue of whether his neurological condition could be caused by the manganese contained in Defendants' welding rods.

In warning the jury that Jones's strategy was to distract it from focusing on the overwhelming medical evidence that showed that Jones did not suffer from manganism, Jones contends that defense counsel engaged in improper closing argument. Specifically, Jones objects to the following remarks by defense counsel:

Defense counsel: * * * They can talk about documents until the cows come home. That's their strategy. See if they can distract you and me, somehow get someone upset or mad and then we'll forget. We can't get to first base. We can't solve the fundamental medical issue, without which none of the rest matters. If you conclude that the condition of Terry Jones is idiopathic Parkinson's disease, that's it--that's it. Why was the lawsuit even brought? Let's go out and say it. I have to say what's on my mind, and I hope I don't offend anyone. That's my style. Why was it brought? Before you bring in the Defendants to the court and incur this expense, and take up your time, don't you talk to the doctors, and say, "What has Plaintiff got?" If they all tell you "idiopathic Parkinson's disease", do you file a lawsuit. Well, maybe you do. But let me tell you why you do. They say, "Look, they're big companies"--

Jones's Counsel: Objection, your Honor. It's improper argument.
Defense Counsel: Hardly.
The Court: The objection is overruled.
Defense Counsel: "They're big companies. We've got some good documents, back in '49 and '50, maybe we can trick the jury."
Jones's Counsel: Objection, your Honor.
Defense Counsel: For what?
The Court: Objection is overruled.
*18 Defense Counsel: Maybe they can trick the jury. Maybe they can distract you, and maybe even me, to focus on that issue. Whereas the fundamental first issue to be resolved. We shouldn't be here. But we are. But we shouldn't be. At best, six to one, with a test, probably seven to nothing. Whatever it is, there is no medical condition, that Terry has--Mr. Jones has, that's caused by anything we did.

Defense counsel then argued that the evidence introduced at trial failed to show that manganese exposure from the welding fumes generated by Defendants' welding rods ever exceeded industry recommended maximum exposure levels. After discussing the testimony of Dr. Eager and Jones's expert industrial hygienist regarding whether Jones was ever exposed to unsafe levels of manganese as a result of using Defendants' welding rods, counsel argued that Jones had failed to establish that he had:

Defense counsel: So, what you have on the exposure--whether or not it's over the [threshold limit value]--is clear, from the people who took the stand. [Jones's expert] says--it was never asked, and whenever he tested, it was below. Eager says, "It's below.", and never challenged. So, where do you go, if you're them, and you've got this serious, serious problem. Documents. "Maybe I can get the jury upset enough, from things in the past, that they won't know what happened." It's the old trick-pack theory. Don't go for the bait.

Jones's counsel: I'm going to object to that, again. It's improper to suggest that we tried to trick the jury. The Court: The objection is overruled.

On appeal, Jones argues that the district court erred in allowing defense counsel to "personally attack" Jones and his counsel during closing argument. Jones submits that defense counsel accused Jones and his counsel of filing an unmeritorious lawsuit against big companies with the hope of "tricking" the jury into awarding Jones an undeserved monetary recovery. Such improper remarks and argument, Jones contends, warrant a reversal and a new trial. We disagree.

We have repeatedly recognized that "improper comments during closing argument rarely rise to the level of reversible error." Probus v. K-Mart, Inc., 794 F.2d 1207, 1210 (7th Cir.1986) (citation omitted). To warrant a new trial, "[s]tatements made during closing argument must be plainly unwarranted and clearly injurious to constitute reversible error." Gruca v. Alpha Therapeutic Corp., 51 F.3d 638, 644 (7th Cir.1995); see also Arcor, Inc. v. Textron, Inc., 960 F.2d 710, 713 (7th Cir.1992) ("Improper statements during closing arguments warrant reversal only if they 'influenced the jury in such a way that substantial prejudice resulted to' the opposing party." (quoting Fenolio v. Smith, 802 F.2d 256, 258 (7th Cir.1986))). As such, the "district court has considerable discretion in supervising the arguments of counsel, and we will reverse a verdict only where the court has abused that discretion." Trytko v. Hubbell, Inc., 28 F.3d 715, 727 (7th Cir.1994).

*19 Contrary to Jones's assertion, we do not construe defense counsel's closing remarks as constituting an improper personal attack on either Jones or his counsel. In our view, these brief comments of which Jones complains were a reasonable response to Jones's assertion that he suffers from manganism and his

repeated attempts during trial and his own closing statement to trivialize the medical testimony of six neurologists who each diagnosed Jones as suffering from idiopathic Parkinson's disease, unrelated to Jones's exposure to manganese. When defense counsel's closing statements are viewed in that context and in light of all the evidence presented at trial, it becomes clear that counsel was merely stressing to the jury that Defendants believed the medical evidence clearly showed that Jones suffers from idiopathic Parkinson's disease, not manganism. In that vein, defense counsel urged the jury not to lose focus of this glaring weakness in Jones's causation argument. Accordingly, defense counsel submitted that Jones's contention that the manganese contained in Defendants' products could lead to the onset of manganism could not ultimately be the dispositive factor in determining whether Defendants were liable for Jones's neurological injuries.

We find nothing improper in this line of argument. Closing arguments are the time in the trial process when counsel is given the opportunity to discuss more freely the weaknesses in his opponent's case and to highlight the strength of his own. Indeed, as the district court aptly noted, a significant part of the lawyer's role during closing arguments is to bolster the strength of his case by calling the jury's attention to certain facts or inferences that might otherwise escape the jury's attention. It is perfectly reasonable for defense counsel to discuss the weaknesses of an opponent's case during closing argument so long as counsel's argument is based on evidence admitted at trial. See Marshall v. Porter County Plan Comm'n, 32 F.3d 1215, 1221-22 (7th Cir.1994); Trytko, 28 F.3d at 727. As we have already explained above, there is more than ample evidence in the record to support Defendants' contention that Jones has idiopathic Parkinson's disease and to belie Jones's belief that he suffers from manganism. Given the paucity of evidence showing that Jones suffered from manganism and the fact that Jones bore the burden of proving that he suffered from that disorder, we believe it was permissible

for defense counsel to inform the jury that Defendants believed that no other issues need be considered in determining whether to hold Defendants liable for Jones's injuries. Consequently, we see no error in defense counsel arguing to the jury that it should resist any efforts by Jones to gloss over this gap in his causation evidence. While Jones may well be correct in his assertion that defense counsel's use of the word "trick" and the term "trick-pack" could have had some negative or inflammatory effect on the jury's perception of the strength of Jones's case, we do not believe such remarks were so egregious as to constitute improper closing argument necessitating the grant of a new trial. Cf. Lindgren v. Lane, 925 F.2d 198, 204 (7th Cir.1991) (concluding that a prosecutor's comment during closing argument that defense counsel is attempting to "trick" the jury by presenting "illusions" is a permissible means of arguing so long as the comments are not overly excessive); see also Moylan v. Meadow Club, Inc., 979 F.2d 1246, 1250-51 (7th Cir.1992) (concluding that defense counsel's closing remarks that plaintiff's claim for overtime wages was a "hold up" were not so egregious as to compel a new trial).

*20 In fact, even if we were to conclude that defense counsel's argument was improper, we cannot say these statements resulted in "substantial prejudice" to Jones necessary to justify the granting of a new trial. A new trial is warranted only if allegedly improper closing remarks depart from the evidence presented at trial and result in substantial prejudice to the opposing party. See Marshall, 32 F.3d at 1221-22. We have previously recognized that improper statements during closing argument cannot be deemed to result in substantial prejudice to the moving party warranting a new trial when the evidence offered at trial is overwhelmingly in favor of the non-moving party. See Mayall v. Peabody Coal Co., 7 F.3d 570, 573 (7th Cir.1993). The overwhelming medical evidence adduced at trial in the instant case showed that Jones suffers from idiopathic Parkinson's disease rather than manganism. In addition

to the testimony of Defendants' medical expert, all five of the independent physicians who treated Jones prior to the filing of this lawsuit concluded that Jones suffered from idiopathic Parkinson's disease. Only Jones's medical expert concluded that Jones's neurological injuries were caused by exposure to manganese--but we have already explained that the weight of this testimony was significantly undermined by Defendants during cross-examination. In any event, Jones has not offered any convincing argument on appeal that defense counsel's statements resulted in substantial prejudice to his case.

Moreover, any potential prejudice to Jones by defense counsel's argument that Jones was attempting to "trick" the jury was lessened considerably by the fact that the district court instructed the jury that statements and arguments made by counsel were not to be considered evidence and that the jury should base its verdict solely on the evidence admitted in the case. We have repeatedly found that jury instructions of this sort mitigate any prejudicial effect of potentially improper remarks made by counsel during closing argument. See id.; see also Valbert v. Pass, 866 F.2d 237, 241 (7th Cir.1989) ("[A]n instruction to the jury stating that the arguments of counsel are not evidence can mitigate the harm potentially caused by improper statements made by counsel during closing argument."). Since we "assume that the jury followed the court's cautionary instructions," see United States v. Mealy, 851 F.2d 890, 903 (7th Cir.1988), we have no reason to believe that the jury impermissibly relied on defense counsel's argument, or any improper inference to be drawn therefrom, in reaching its verdict. See, e.g., United States v. Rose, 12 F.3d 1414, 1426- 27 (7th Cir.1994) (reasoning that courts must presume that juries heed limiting instructions that closing arguments are not to be considered evidence).

*21 For the foregoing reasons, we conclude that the district court did not abuse its discretion in overruling Jones's objections

to defense counsel's closing argument and, therefore, we find that the court did not err in refusing to grant Jones a new trial on this ground.

C. Jones Is Not Entitled A New Trial Based On 'Newly Discovered' Evidence

We next turn to address Jones's challenge that the district court erred in denying his Rule 60(b)(2) motion in which he claimed that "newly discovered" evidence showed that Dr. Eager testified falsely at trial and that evidence of this false testimony was sufficient to warrant granting him a new trial. Pursuant to Federal Rule of Civil Procedure 60(b)(2), a party may be entitled to relief from the entry of final judgment if that party presents "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Fed.R.Civ.P. 60(b)(2). Relief under Rule 60(b)(2) "is an extraordinary remedy that is to be granted only in exceptional circumstances." Provident Sav. Bank v. Popovich, 71 F.3d 696, 698 (7th Cir.1995). We have held that the grant of a new trial on the ground of newly discovered evidence requires proof of the following five prerequisites:

1. The evidence was discovered following trial;
2. Due diligence on the part of the movant to discover the new evidence is shown or may be inferred;
3. The evidence is not merely cumulative or impeaching;
4. The evidence is material; and
5. The evidence is such that a new trial would probably produce a new result. In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co., 78 F.3d 285, 293-94 (7th Cir.1996). If any one of these prerequisites is not satisfied, the movant's Rule 60(b)(2) motion for a new trial must fail. See In re Wildman, 859 F.2d 553, 558 (7th Cir.1988).

Jones's "newly discovered" evidence consisted of allegations that Dr. Eager's trial testimony concerning the Joint Research and the Caterpillar Study were false. Specifically, Jones pointed to three areas in which he submitted that Dr. Eager gave false testimony.

First, Jones alleged that Dr. Eager falsely testified to the "facts" that formed the basis for the district court's ruling that he had the necessary qualifications to offer an opinion regarding the ability of the body to absorb manganese contained in welding fumes and the toxicity of manganese in mild steel welding fumes. Jones argued that in order to qualify himself to offer an opinion as to these matters, Dr. Eager testified that he had conducted "joint research" with Professors Brain and Ulrich on the effects of welding fumes on animal lungs (the Joint Research) and that he and Professor Brain "had published papers together." Jones submits that the district court relied on that testimony as the basis for its ruling that Dr. Eager was qualified to testify as to the conclusions reached by the Joint Research regarding absorption and toxicity.

*22 In his Rule 60(b) motion, Jones contended this testimony was false because Dr. Brain testified in a subsequent unrelated case that he had never conducted any "joint research" with Dr. Eager, nor had he published any papers with him. Moreover, Jones relied on Dr. Eager's deposition testimony from that same litigation in which Dr. Eager testified that he was not an author of the article that eventually published the results of the Joint Research ("Welding Article"), that he specifically requested to have his name removed from an earlier draft of that article because he felt that he had not made a significant contribution to the underlying research, and that his role in the Joint Research had been limited to attending researcher's meetings and providing advice on welding.

Second, having hoodwinked the court into allowing him to testify, Jones contends that Dr. Eager materially mischaracterized

the conclusions reached by the Joint Research. Jones submits that Dr. Eager falsely testified that their "joint research" reached conclusions regarding the ability of the body to absorb manganese contained in welding rod fumes and toxicity of the manganese in that form. As we previously indicated, Dr. Eager testified that the Joint Research concluded that there was no difference between placing welding fumes and saline solution or non-toxic iron oxide into the animal's lungs and that there was no measurable toxic effect of the welding fume containing manganese on the lung.

Jones argued that his "newly discovered" evidence showed that the Joint Research, or more specifically, Dr. Brain, never studied or reached any conclusions with respect to these two issues. In support of his argument, Jones once again relied on Dr. Brain's deposition testimony in the subsequent unrelated case. According to Jones, Dr. Brain's testimony conflicted with Dr. Eager's trial testimony in that Dr. Brain stated that he had not studied the form of manganese in welding fumes, that the Joint Research had reached no conclusions with regard to the ability of the lung to absorb manganese or any differences in absorption between welding fumes and saline solution or iron oxide, and that he had never studied the toxicity of manganese nor had the Joint Research concluded that welding fumes had no toxic effect on the lung.

Finally, Jones argued that Dr. Eager falsely testified that the epidemiological study of welders conducted at Caterpillar (the Caterpillar Study) found a lack of manganese toxicity in welding fumes when the Study did not even address the issue. At trial, Dr. Eager testified that the Caterpillar Study concluded that welders working at a Caterpillar steel plant in Illinois did not experience "any more diseases or health effects or leukemia or cancer or anything else than people who work at Caterpillar who didn't weld."

Jones contended that this testimony was also false because the

Caterpillar Study did not address the potential neurological effects of manganese in welding fumes. Instead, the Study compared causes of death among Caterpillar workers focusing primarily on lung cancer death rates. It did not, Jones submitted, address any non-fatal health effects from welding. Moreover, Jones alleged that Dr. Eager testified in subsequent unrelated proceedings that the Caterpillar Study did not examine the effects of manganese in mild steel welding fumes on welders.

*23 After conducting two hearings and reviewing the substantial amount of evidence submitted by both parties on the veracity of Dr. Eager's trial testimony, the district court issued an order denying Jones's Rule 60(b)(2) motion. The court cited four grounds in support of its ruling. First, the district court concluded that Eager did not materially mischaracterize his participation in the Joint Research. The court found that Jones read too much into Dr. Brain's deposition testimony that he never conducted "joint research" with Dr. Eager. Placing Dr. Brain's testimony into context revealed that he has an extremely narrow personal view of what it means to conduct "joint research" with another person. According to Dr. Brain's definition, performing "joint research" meant that the other participant is so intimately associated with the research as to deserve co-authorship on any paper or papers detailing the results. Under that definition, Dr. Brain testified that he and Dr. Eager had not conducted "joint research." However, Dr. Brain did acknowledge that he had a working research relationship with Dr. Eager, that he consulted with Dr. Eager as a welding expert in connection with the Joint Research, and that Dr. Eager participated in meetings and provided advice on welding in connection with that research. Indeed, the Welding Article subsequently published by Dr. Brain and the other authors detailing the results of the Joint Research thanked Dr. Eager for his contribution. Moreover, the court found that the testimony of Dr. Ulrich and Dr. Antonini, [FN8] both of whom testified in

connection with Jones's Rule 60(b)(2) motion, showed that Dr. Eager played a substantial, although not dominant, role in the Joint Research and was intricately involved in attempts to obtain funding for joint research proposals for welding fumes research that preceded the Joint Research. Based on this evidence, the district court found that Dr. Eager's trial testimony was not materially false.

Second, the court determined that Dr. Eager did not testify falsely regarding the results of research underlying the Joint Research. The district court concluded that Jones, at best, showed that Dr. Eager and Dr. Brain had a difference of opinion as to the results generated by the research on exposing animal lungs to welding fumes and that such a scholarly and subjective disagreement was not a sound basis for finding that Dr. Eager lied on the witness stand. In essence, the district court found that the evidence adduced in the Rule 60(b)(2) proceedings could colorably be construed to support the conclusions Dr. Eager ascribed to the Joint Research, and, therefore, Dr. Eager's testimony could not be said to be materially false.

Third, the court concluded that any Rule 60(b)(2) challenge concerning Dr. Eager's testimony with regard to the Caterpillar Study failed because Jones did not exercise due diligence in discovering the alleged falsity of Dr. Eager's trial testimony. See Fed.R.Civ.P. 60(b)(2) (providing that a movant's motion must be based on newly discovered evidence that could not have been discovered in time to move for a new trial under Rule 59(b)). The court found that the "new" evidence raised by Jones in his Rule 60(b)(2) motion purporting to show that Dr. Eager testified falsely was the Caterpillar article summarizing the Caterpillar Study's conclusions. However, the district court concluded that statements made by Jones during closing argument indicated that he was aware of the article and the conclusions reported therein. Specifically, during his closing, counsel stated that the Caterpillar Study was a cancer study involving welders and that it did not, as

Dr. Eager testified, evaluate the effects of welding fumes on welders. Furthermore, the court reasoned that even if counsel did not know of the article when Dr. Eager testified at trial, counsel had every incentive to obtain and review the article as soon as possible to ensure that Dr. Eager had fairly conveyed its findings. Accordingly, the court concluded that the Caterpillar article was either known to Jones and his counsel at trial or could have been obtained, in the exercise of due diligence, in time to file a Rule 59 motion.

*24 Finally, and most importantly, the district court concluded that a new trial without Dr. Eager's allegedly "false testimony" testimony would probably not produce a new result. The court first noted that Jones took much of the force away from Dr. Eager's testimony when he pointed out to the jury that Dr. Eager was neither a toxicologist nor an expert on matters of physiology. The court also found that Jones undermined Dr. Eager's testimony by reminding the jury that whatever findings Dr. Eager testified to regarding the toxic effect of welding fumes on lungs, it bore little relevance to Jones's claim of brain damage. Moreover, Jones's medical expert, Dr. Klawans, undercut the weight of Dr. Eager's testimony by testifying that medical research showed that manganese in welding fumes could lead to the onset of manganism by entering a welder's respiratory tract, being absorbed into the bloodstream, and traveling to the brain where it causes neurological damage. But most fundamentally, the district court found that the weakness in Jones's medical causation evidence was absolutely fatal to his claim against Defendants. The court noted that at least four physicians diagnosed Jones with idiopathic Parkinson's disease; whereas only Jones's expert determined that Jones suffered from manganism, and the court found that his testimony was "significantly undermined on cross-examination." Accordingly, the court concluded that Jones failed to prove that subtracting Dr. Eager's challenged testimony would

probably change the outcome of the trial in light of what the physicians said at trial concerning the cause of Jones's condition.

On appeal, Jones contends that the district court abused its discretion in reaching each of these conclusions and, as a result, abused its discretion in denying his motion for a new trial. We review a district court's denial of a Rule 60(b)(2) motion for abuse of discretion. See Harris v. Owens-Corning Fiberglas Corp., 102 F.3d 1429, 1434 (7th Cir.1996); Mares v. Busby, 34 F.3d 533, 535 (7th Cir.1994). In the context of a motion for a new trial, we employ a highly deferential abuse of discretion standard under which we affirm the decision of the district court unless the movant can show that no reasonable person could agree with the court. See Harris, 102 F.3d at 1434; Mares, 34 F.3d at 535. "We especially are disinclined to substitute our judgment for that of the district court when the record affirmatively manifests that the matter received careful, thorough consideration by the district judge." Gomez v. Chody, 867 F.2d 395, 405 (7th Cir.1989). After reviewing the district court's denial of Jones's Rule 60(b)(2) motion, we find no indication that the district court abused its discretion in denying Jones a new trial.

A detailed discussion of all of Jones's challenges is not warranted in light of our resolution of his claims that Dr. Eager's testimony on these matters was improperly admitted into evidence in the first place. That is, we need not address Jones's challenges to the district court's conclusions regarding his lack of diligence in discovering the alleged falsity of Dr. Eager's testimony relating to the Caterpillar Study, the falsity of Dr. Eager's testimony that he conducted "joint research" and published papers with Dr. Brain, and the falsity of Dr. Eager's testimony regarding the results reached by the Joint Research, because even if we assume that Jones acted with reasonable diligence and that Dr. Eager's testimony was likely false, we ultimately agree with the final and dispositive ground the court articulated as a basis for denying relief--the newly discovered evidence was not significantly material

to the ultimate outcome of this case and Jones failed to show that subtracting this testimony from the trial would have probably resulted in a verdict in his favor. As we set forth above, in order to have a successful Rule 60(b)(2) motion, Jones had to prove that the newly discovered evidence "is such that a new trial would probably produce a new result." In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co., 78 F.3d at 294. The district court concluded that Jones failed to satisfy this requirement, and Jones offers no convincing argument on appeal that the district court abused its discretion in reaching this conclusion.

*25 The testimony that Jones submits is materially false in his Rule 60(b)(2) motion is, for the most part, the same testimony that Jones objected to as being improperly admitted into evidence in the first place. In the context of ruling on his appeal of the district court's evidentiary rulings, we fully examined Jones's challenges to the admission of that testimony and concluded that any error by the court in admitting this evidence was harmless because the challenged testimony did not contribute to the verdict in a meaningful manner. Since our inquiry here into whether Jones's newly discovered evidence "would probably produce a different result" in a retrial is essentially the same as our harmless error inquiry, Jones's contention that subtracting Dr. Eager's allegedly false testimony with respect to these matters from the trial would probably result in a different outcome ultimately fails for the same reasons that we held that the admission of this testimony into evidence was harmless error.

Simply put, the outcome of this case turned on the issue of whether Jones suffered from idiopathic Parkinson's disease or manganism. The medical evidence introduced at trial showed that he suffered from idiopathic Parkinson's disease, and, therefore, evidence suggesting that welding fumes either could or could not lead to the onset of manganism was not terribly material nor relevant to the ultimate determination of Defendants' liability for

Jones's neurological disorder. And since we have already concluded that the admission into evidence of the testimony that Jones now challenges as being false was harmless error, it would make little sense for us now to conclude that subtracting this testimony from trial would probably result in a verdict in Jones's favor in the context of Jones's Rule 60(b)(2) motion for a new trial.

Thus, given the weakness of Jones's case, we cannot say that the outcome of a retrial without Dr. Eager's testimony would probably produce a different result. Therefore, Jones's "newly discovered" evidence fails to satisfy all the necessary requirements under Rule 60(b)(2) to warrant the grant of a new trial. Accordingly, we conclude that the district court did not abuse its discretion in denying Jones's Rule 60(b) motion.

D. The District Court Did Not Err In Denying Jones's Motion To Hold Dr. Eager In Contempt

Jones's final challenge is that the district court erred in denying his motion for a rule to show cause why Dr. Eager should not be held in contempt of court for providing false testimony at trial. Based on the same allegations spelled out above, Jones moved the court to hold Dr. Eager liable in civil contempt and to recover from Dr. Eager all of the costs incurred by Jones in connection with the prosecution of his case, the legal expenses of preparing for and conducting a second trial, and a civil fine. In addition, Jones sought disgorgement of the expert witness fees Defendants paid to Dr. Eager for his time spent in connection with this case. While Dr. Eager vigorously argued that he testified truthfully at trial and that Jones's allegations were based upon selective and out-of context quotations from testimony elicited in a subsequent unrelated proceeding, the district court did not reach the truthfulness of Dr. Eager's testimony in denying Jones's contempt motion. [FN9]

*26 Instead, the court denied Jones's motion on the ground that the nature and purpose of civil contempt does not warrant applying it to a witness who testifies falsely at trial. The court ruled that even assuming Jones's allegations were true, the mere provision of false or perjurious testimony does not constitute civil contempt without some added showing that the testimony obstructed the court's authority to conduct orderly proceedings or perform its duties. The court reasoned that to be subject to civil contempt, Dr. Eager must have disobeyed an explicit court order or must have otherwise defied or obstructed the court's authority to conduct orderly proceedings. The court found that Dr. Eager's testimony, even if false, failed to satisfy this standard for three reasons. First, the court never ordered Dr. Eager to testify truthfully. Although witnesses swear an oath to testify truthfully at trial, this oath is not tantamount to a court order. Second, since the essential function of a trial is "truth-finding," the provision of false testimony at trial could not be said to significantly impede that function. The court reasoned that by their very nature, trials contain conflicting and oftentimes diametrically opposed testimony; however, this does not ordinarily affect a court's ability to conduct orderly trials. Third, the court reasoned that an essential justification for the measure of civil contempt is to give courts a tool for forcing obedience to their orders. The court could not order Dr. Eager to come back and testify "truthfully" thereby restoring "order" to a trial that was already concluded. Based on these grounds, the court denied Jones's motion to hold Dr. Eager in contempt.

On appeal, Jones contends that the court erred in requiring that Jones prove, in addition to showing that Dr. Eager testified falsely, the additional element that his testimony obstructed justice. Jones submits that the added "obstruction of justice" requirement is only applicable to criminal contempt proceedings and that federal courts have held that testifying falsely is, in and of itself, a sufficient basis for a finding of civil contempt. Jones also

believes that the district court's ruling essentially leaves him without any remedy for the harm caused by Dr. Eager's false testimony. For these reasons, Jones argues that the district court's order should be reversed.

We review the district court's denial of Jones's contempt motion under an abuse of discretion standard. Stotler and Co. v. Able, 870 F.2d 1158, 1163 (7th Cir.1989). "A district court's decision on a contempt petition is discretionary in character and is not to be reversed except for abuse of such discretion or unless clearly erroneous." Id. (internal quotation marks and citations omitted). Upon close review, we find Jones's arguments to be without merit and affirm the decision of the district court.

*27 A court's civil contempt power rests in its inherent limited authority to enforce compliance with court orders and ensure judicial proceedings are conducted in an orderly manner. See e.g., D. Patrick, Inc. v. Ford Motor Co., 8 F.3d 455, 459 (7th Cir.1993); Ferrell v. Pierce, 785 F.2d 1372, 1378 (7th Cir.1986). To hold a party or witness in civil contempt, "the district court must be able to point to a decree from the court which 'set[s] forth in specific detail an unequivocal command' which the party [or witness] in contempt violated." Ferrell, 785 F.2d at 1378 (quoting H.K. Porter Co. v. National Friction Prods., 568 F.2d 24, 27 (7th Cir.1977)). Civil contempt proceedings are coercive and remedial, but not punitive, in nature and sanctions for civil contempt are designed to compel the contemnor into compliance with an existing court order or to compensate the complainant for losses sustained as a result of the contumacy. See International Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 826-28, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994); Connolly v. J.T. Ventures, 851 F.2d 930, 932 (7th Cir.1988).

Thus, civil contempt proceedings may be classified into two categories. Coercive sanctions, which are really the essence of civil contempt, seek to induce future behavior by attempting to coerce

a recalcitrant party or witness to comply with an express directive from the court. See Latrobe Steel Co. v. United Steelworkers of Am., AFL-CIO, 545 F.2d 1336, 1344 (3rd Cir.1976). Remedial sanctions, by contrast, are backward-looking and seek to compensate an aggrieved party for losses sustained as a result of the contemnor's disobedience of a court's order or decree made for the aggrieved party's benefit. See id. However, irrespective of the nature of the civil contempt, whether it be coercive or remedial, any sanction imposed by the court must be predicated on a violation of an explicit court order. See Ferrell, 785 F.2d at 1378; see also Boylan v. Detrio, 187 F.2d 375, 378-79 (5th Cir.1951).

Jones's contempt motion obviously cannot be characterized as "coercive" in nature because his trial is over, and, therefore, the court could not seek to cure the alleged violations by ordering Dr. Eager to return and testify "truthfully" under the threat of contempt sanctions. Therefore, if Jones's allegations of false swearing are to constitute civil contempt, which they do not, the only relief that the court could grant is remedial to compensate Jones for any damage caused by Dr. Eager's perceived disobedience. However, Jones's claim for remedial relief necessarily fails because he cannot show that Dr. Eager disobeyed the court's authority in any manner that justifies the imposition of civil contempt sanctions. As the district court stated in its decision, "this Court never ordered Dr. Eager to testify truthfully. Granted Dr. Eager swore to do so, but that oath does not amount to an order of the Court." The remedial relief contemplated by civil contempt is to compensate the aggrieved party for losses sustained as a result of the contemnor's non- compliance with an existing court order. Dr. Eager violated no court decree ordering him to take or not to take certain action. In the absence of such an order, and any conduct in violation thereof, we cannot say that the court erred in denying Jones's contempt motion.

*28 Moreover, contrary to Jones's position on appeal, our review

of relevant authority makes clear, in a manner consistent with the district court's holding, that civil contempt is an improper method by which to punish perjurious or false testimony absent some element of obstruction of justice. See Ex parte Hudgings, 249 U.S. 378, 383-84, 39 S.Ct. 337, 63 L.Ed. 656 (1919); see also Sigety v. Abrams, 632 F.2d 969, 976 (2d Cir.1980) ("As broad as the power of civil contempt may be, it does not include the power to punish for the crime of perjury...."). In Ex parte Hudgings, the trial court held a witness in contempt for refusing to testify truthfully at trial and ordered the witness committed into custody until he purged himself of the contempt for which he was being punished. See 249 U.S. at 381-82. The issue placed before the Supreme Court was whether the "power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury." Id. at 382. The Court held that a witness could not be held in contempt for perjury unless it be shown that some further element of obstructing the court's authority be proven. See id. at 383-84. The Court explained:

> An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is ... the characteristic upon which the power to punish for contempt must rest. This being true, it follows that the presence of that element must clearly be shown in every case where the power to punish for contempt is exerted--a principle which, applied to the subject in hand, exacts that in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty.

Id. at 383. In reaching this conclusion, the court rejected earlier decisions that treated perjury without any other element as adequate to sustain a contempt finding, reasoning that those cases either overlooked or misconceived the essential characteristic of the obstructive tendency underlying the court's contempt power,

or mistakenly attributed a necessarily obstructive effect to false swearing. See id. at 383-84. If either of those rationales were in fact true, the Court reasoned, then

> it would follow that when a court entertained the opinion that a witness was testifying untruthfully the power would result to impose a punishment for contempt with the object or purpose of exacting from the witness a character of testimony which the court would deem to be truthful; and thus it would come to pass that a potentiality of oppression and wrong would result and the freedom of the citizen when called as a witness in court would be gravely imperiled.

*29 Id. at 384.

In In re Michael, 326 U.S. 224, 66 S.Ct. 78, 90 L.Ed. 30 (1945), the Supreme Court reaffirmed this principle that false testimony alone does not produce the obstruction of the court's authority necessary to satisfy holding a party or witness in contempt:

> All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact finding tribunal must hear both truthful and false witnesses. It is in this sense, doubtless, that this Court spoke when it decided that perjury alone does not constitute an "obstruction" which justifies exertion of the contempt power and that there "must be added to the essential elements of perjury under the general law the further element of obstruction to the Court in the performance of its duty."

Id. at 227-28 (quoting Ex parte Hudgings, 249 U.S. at 383-84).

In the instant case, Jones's contempt motion made no allegation

of any obstructive element other than Dr. Eager's false testimony. Without the presence of some obstructive action on the part of Dr. Eager, the authorities cited above clearly indicate that the district court lacked the authority to hold him in civil contempt and Jones cites no persuasive authority to the contrary. See also Boylan, 187 F.2d at 378 (reasoning that acts of false swearing or perjury, standing alone, are insufficient to constitute civil contempt); United States v. Goldstein, 158 F.2d 916, 920 (7th Cir.1947) ("Perjury by a witness has been thought to be not enough where the obstruction to judicial power is only that inherent in the wrong of testifying falsely.... For offenses of that order the remedy by indictment is appropriate and adequate." (quoting Clark v. United States, 289 U.S. 1, 11, 53 S.Ct. 465, 77 L.Ed. 993 (1933))).

Indeed, to hold a witness liable in money damages merely because he or she testified falsely at trial would violate the long-standing common law rule that parties and witnesses are immune from subsequent damages liability for their testimony in judicial proceedings. See Briscoe v. LaHue, 460 U.S. 325, 332-36, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); Butz v. Economou, 438 U.S. 478, 512, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). Instead, the proper recourse against a witness who testifies falsely at trial is a subsequent prosecution for perjury. See, e.g., In re Kitchen, 706 F.2d 1266, 1274-75 (2d Cir.1983) ("[A] witness who testifies falsely is ordinarily subject to prosecution for a criminal offense, e.g., perjury, but not to sanctions for civil contempt.").

*30 Finally, it cannot be said that Jones lacked an adequate remedy to redress his claim that Dr. Eager testified falsely at trial. Jones filed a Rule 60(b)(2) motion for a new trial based on Dr. Eager's allegedly false trial testimony. The possibility that Jones could have received a new trial on the basis of these allegations of perjury, if proven, is a sufficient and adequate remedy for any

harm that might have been caused by Dr. Eager's trial testimony.

III. Conclusion

For the foregoing reasons, the jury verdict and the orders of the district court are AFFIRMED.

FN* The Honorable Walter J. Cummings participated in oral argument and consideration of this case, however, he died on April 24, 1999.

FN1. The district court entered a directed verdict in favor of Inco Alloys International, Incorporated at the close of Jones's case-in-chief. Jones does not appeal this ruling and Inco is not a party to this appeal.

FN2. Although Dr. Shannon was unaware of Jones's manganese exposure when she conducted her examinations, she testified that a patient's history of exposure to manganese would only be relevant to the determination of the cause of a patient's Parkinsonism if she found that the patient exhibited atypical features suggesting that the patient did not suffer from idiopathic Parkinson's disease.

FN3. Jones had been living in the Las Vegas area for several years, but had been traveling back to Chicago for work.

FN4. Dr. Olanow specializes in neurology at Mount Sinai Medical Center in New York City, with a subspecialty in movement disorders, which includes Parkinson's disease and other related disorders that cause patients to have involuntary or slowed movements.

FN5. Dr. Klawans specializes in neurology at RushPresbyterian St. Luke's Medical Center in Chicago. Like Dr. Olanow, Dr. Klawans's subspeciality is movement disorders.

FN6. Although Jones also objected to Dr. Eager's testimony regarding the Joint Research on Rule 26 grounds on the morning following the admission of this testimony into evidence, this objection is not material to our resolution of his claims on appeal and, therefore, we need not determine whether this belated objection was properly preserved for appeal.

FN7. Defendants maintain that Dr. Eager did not render any "opinion" testimony but merely reported the conclusions reached by the Joint Research. Since he participated in the Joint Research and discussed the findings generated by that research in a reciprocal exchange of information with Dr. Brain and others involved in the research project, Defendants submit that the district court did not abuse its discretion in allowing Dr. Eager to summarize the Joint Research's findings. Any questions regarding the methodology and conclusions reached by the Joint Research, Defendants believe, could be appropriately addressed during cross-examination. While Dr. Eager may have had personal knowledge of the findings of the Joint Research, Defendants' argument ignores the fact that Dr. Eager did not have the necessary background to fully explain how those conclusions were reached. Without such background, we fail to see how cross-examination could realistically have challenged the methodology employed by or the conclusions reached by the Joint Research.

FN8. Dr. Antonini was a research fellow responsible for conducting the day-to-day laboratory work in connection with the Joint Research.

FN9. In light of the district court's subsequent order denying Jones's Rule 60(b)(2) motion analyzed above, it appears that the court concluded that the bulk, if not all, of Dr. Eager's challenged trial testimony was not materially false. However, because the court did not reach this issue in denying Jones's contempt motion, relying instead on the lack of legal foundation for holding a party in contempt solely on the basis of providing false testimony at trial, we will contain our review of whether the court erred in denying his contempt motion to this ground.

Terry B. **JONES**, Plaintiff,
v.
LINCOLN ELECTRIC CO., et al., Defendants.

No. 2:95-CV-83-RL.

United States District Court,
N.D. Indiana,
Hammond Division.

March 18, 1997.

Welder brought products liability case against manufacturer of welding rods in which verdict was returned for manufacturers. On welder's motion for a

rule to show cause why expert who testified in products liability case should not be held in contempt, the District Court, Lozano, J., held that expert was not subject to civil contempt for giving allegedly false testimony.

Motion denied.

*1094 Michael Cascino, Robert George McCoy and Frank Stachyra, Casino and Vaughan, Chicago, IL, for Plaintiff.

David Gloor, Cassiday Schade & Gloor, Chicago, IL, Mathew F. Kennelly, Cotsirilos, Stephenson, Tighe & Streicker, Chicago, IL, for Defendants.

ORDER

LOZANO, District Judge.

This matter is before the Court on Plaintiff's Motion for a Rule to Show Cause Why Thomas W. Eagar Should Not Be Held in Contempt of Court, filed on November 29, 1996. For the reasons set forth below, this motion is DENIED and the civil contempt proceedings against Dr. Eagar are DISMISSED.

BACKGROUND

In this products liability action, Plaintiff, Terry B. Jones, sued six manufacturers of the tools of his trade, "welding rods." The case went to trial. Dr. Thomas W. Eagar testified as an expert witness. The jury returned a verdict

for the manufacturers. Jones took an appeal. Almost a year after the jury's verdict and while the appeal was still pending, Jones filed a motion for a new trial, alleging that Dr. Eagar gave false testimony by materially mischaracterizing his participation in a research study, the results of that study, and the results of another study. Simultaneously, Jones also filed a motion for a rule to show cause why Dr. Eagar should not be held in contempt.

DISCUSSION

Jones seeks to hold Dr. Eagar liable in civil contempt. Dr. Eagar responds that a witness who does no more than give false testimony is not subject to civil contempt. The Court agrees with Dr. Eagar because the nature and purpose of civil contempt do not warrant applying it to mere false testimony.

[1] Although the precise civil contempt issue here is not well-settled, some related principles of criminal contempt and perjury are. No doubt, giving false testimony can constitute the crime of perjury. In re Michael, 326 U.S. 224, 226-27, 66 S.Ct. 78, 90 L.Ed. 30 (1945); Matter of Kitchen, 706 F.2d 1266, 1274-75 (2d Cir.1983). However, the law is clear that the same false testimony that constitutes perjury does not also constitute criminal contempt without some added element of obstruction of justice or the court's authority. Michael, 326 U.S. at 227-29; United States v. Griffin, 589 F.2d 200, 205 (5th Cir.1979).

Essentially, Jones and Dr. Eagar debate whether the criminal contempt requirement of an added obstructive

element also applies to civil contempt. In other words, they debate whether Dr. Eagar is subject to civil contempt merely if he gave false testimony, or whether he must have also obstructed the Court in some additional way. (Jones seems to concede that Dr. Eagar did no more than testify falsely; Jones has not alleged any added obstructive element.)

[2] Although there appears to be a dearth of pointed authority, this Court concludes *1095 that several factors combine to give Dr. Eagar the stronger position. Albeit without much explanation, some courts have concluded that the added-obstructive-element which applies in the criminal contempt context also applies in the civil context. Kitchen, 706 F.2d at 1274-75; Times Herald Printing Co. v. Dallas Morning News Co., 1987 WL 20403, at *1 (N.D.Ill.1987). Other authorities echo this view by describing civil contempt as a measure designed largely if not exclusively for (1) coercing a party or witness to comply with a court order or other form of court authority, or (2) compensating harm caused by defiance of an order or other form of court authority. [FN1] From these authorities, this Court draws the conclusion that to be subject to civil contempt, the alleged contemnor's behavior must disobey an explicit court order or otherwise defy or obstruct the court's authority to conduct orderly proceedings.

FN1. Matter of Credediо, 759 F.2d 589, 590-91 (7th Cir.1985) ("[C]ivil contempt is primarily coercive in nature."); Times Herald, 1987 WL 20403, at *1 ("Civil contempt is a sanction available to the court to either coerce compliance with the court's authority, compensate a complainant for losses sustained due to non-compliance,

or both."); Russell v. Sullivan, 887 F.2d 170, 171 (8th Cir.1989) ("Civil contempt exists only where a court order exists and can be enforced."); 3 Charles A. Wright, Federal Practice and Procedure § 704, pp. 823-24 (2d ed. 1982) ("A contempt proceeding is civil if the purpose is remedial and intended to coerce the person into doing what he is supposed to do."); Black's Law Dictionary, pp. 318-19 (6th ed.1990) (defining "contempt" as a "willful disregard or disobedience of a public authority" and civil "contempt of court" as the "failure to do something which the party is ordered by the court to do").

[3] Although perhaps a close question, the Court concludes that by itself, Dr. Eagar's alleged false testimony does not satisfy this test. First, this Court never ordered Dr. Eagar to testify truthfully. Granted, Dr. Eagar swore to do so, but that oath does not amount to an order of the Court.

[4] Second, assuming that Dr. Eagar did testify falsely, his doing so did not otherwise defy or obstruct the Court's authority. Of course, an essential function of a trial is truth-finding, and false testimony can impede that function. Michael, 326 U.S. at 227 (criminal contempt decision noting that "[a]ll perjured relevant testimony is at war with justice, since it may produce a judgment not resting on the truth"). Yet the truth-finding function and the trial court's authority are not interchangeable players in the litigation process, and impeding the former does not necessarily equate with impeding the latter. See id. (noting that perjured testimony "need not necessarily ... obstruct or halt the judicial process"). Here, the Court was able to use its authority to conduct an orderly trial regardless of whether Dr. Eagar's testimony will turn out to have been false. Indeed, by their very nature trials contain conflicting testimony, and in some sense the testimony offered by the party who loses might often be said to

have been "false." Yet courts routinely conduct orderly trials with such "false" testimony. See id. at 228 (noting that in performing the truth-finding function the trial court "must hear both truthful and false witnesses"). Of course, Jones does not argue that Dr. Eagar's testimony was false in the mere sense that it conflicted with the view of another, but false in the sense that it had no grounding in objective reality. Still, the fact remains that Dr. Eagar never defied an explicit order nor otherwise prevented the Court from controlling the trial.

[5] Third, with the trial over, the Court cannot coerce Dr. Eagar to do anything. A prominent if not essential reason for the measure of civil contempt is to give courts a tool for forcing obedience to their orders. At this point, this Court certainly cannot order Dr. Eagar to come back and testify "truthfully" and thereby restore "order" to the trial, which is long over.

[6] The Court notes that although Jones cannot benefit from civil contempt, he still has a potential alternative remedy. As noted above, Jones has filed a motion under Federal Rule of Civil Procedure 60(b) seeking a new trial on the ground of newly discovered evidence. If Jones can satisfy the requirements of Rule 60(b) with respect to Dr. Eagar's testimony, he may gain the remedy of a new trial, although likely not the cost of the first trial he seeks to recover through civil contempt.

Finally, the Court notes that this ruling is not intended to comment one way or the *1096 other on whether Dr. Eagar is subject to prosecution for perjury. The Court has not endeavored in this ruling to determine whether Dr. Eagar actually did give false testimony. For now, the Court reserves judgment on whether to refer this matter to the United States Attorney.

Any previous settings and orders regarding Plaintiff's Rule 60(b)

motion are hereby REAFFIRMED.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for a Rule to Show Cause Why Thomas W. Eagar Should Not be Held in Contempt of Court is DENIED, and the civil contempt proceedings are DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

TERRY B. JONES,	)	
	)	
Plaintiff.	)	
	)	
vs.	)	No. 2:95-CV-83-RL
	)	
LINCOLN ELECTRIC CO., et al.,	)	
	)	
	)	
Defendants.	)	

ORDER

This matter is before the Court on the following motions, filed on December 21, 1995: (1) Plaintiff's Motion for New Trial, (2) Plaintiff's Post-Trial Motion for Sanctions, and (3) Plaintiff's Post-Trial Motion for Leave to Communicate With Jurors. For the reasons set forth below, these motions are all **DENIED**.

BACKGROUND

Plaintiff, Terry B. Jones, brought this negligence and strict products liability case against six defendants. Jones alleged that welding products manufactured and distributed by Defendants and used by Jones in his work made him ill. The case recently went to trial, at which the Court granted judgment as a matter of law in favor of one Defendant and the jury returned a verdict in favor of the remaining Defendants and against Jones.

The trial of this case was no small undertaking for the Court or the parties. The trial lasted nine days. Roughly sixteen witnesses testified. Many exhibits were received into evidence. Counsel vigorously contested a major hearsay issue, whether recent reforms to Indiana tort law should be retroactively applied to this case, and whether the question of punitive damages should go to the jury. In the end, a mountain of evidence went to the jury, much of it over the objection of one side or the other, and the jury found the evidence to favor Defendants.

Against this backdrop, Plaintiff has filed a trio of post-trial motions. None of them is well-supported.

DISCUSSION

Motion for New Trial

Plaintiff's motion for new trial is too cursory to warrant serious treatment from this Court. It runs one and one-half pages and eight numbered paragraphs. Plaintiff file no supporting brief. The motion provides a rote citation to Federal Rule of Civil Procedure 59, but in no way acknowledges or applies the standard that governs granting new trials under that Rule. In the eight numbered paragraphs, Plaintiff lists several alleged trial errors, providing only the

barest description of each. Plaintiff makes no attempt whatsoever to show how these alleged errors, assuming they were errors, prejudiced him in the context of a complex trial to an extent that warrants granting a new trial.

In essence, Plaintiff's motion for a new trial is an invitation to the Court and defense counsel to do the work of Plaintiff's counsel. This Court need not and should not entertain such a motion. *Tyler v. Runyon*, 70 F.3d 458, 464-65 (7th Cir. 1995); *see Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 917-18 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1964 (1995) (Suggesting that largely unsupported arguments which evidence a "blunerbuss" approach by counsel do not warrant serious attention from a court; *Hershinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984) (refusing to consider an argument that was briefed in a "perfunctory and underdeveloped [ ] manner"). Accordingly, Plaintiff's Motion for New Trial is DENIED.

Plaintiff's Post-Trial Motion for Sanctions

Plaintiff is requesting sanctions pursuant to Federal Rule of Civil Procedure 37, alleging that Defendants failed to timely disclose the basis of the testimony of one of their expert witnesses. This motion is not accompanied by a separate supporting brief, and thus does not comply with Local Rules. N.D. Ind. L.R. 7.1(a). Accordingly, Plaintiff's Post-Trial Motion for Sanctions is **DENIED**.

Plaintiff's Post-Trial Motion for Leave to Communicate with Jurors

In this motion, Plaintiff's counsel seeks leave to contact and speak with jurors "to understand [their] thought process in reaching their verdict." (Mot. ¶ 3) As counsel recognizes, "No attorneys appearing in this court . . . shall approach, interview, or communicate with any member of the jury except on leave of court granted . . . upon good cause shown. This rule applies to

any communication . . . with members of the jury . . . after return of a verdict." N.D. Ind. L.R. 47.2. Counsel's attempt at showing good cause amounts to a terse assertion that it is "critical" for him to understand why the jury reached its verdict, and an off-hand reference to the First Amendment. These assertions do not demonstrate good cause. Accordingly, Plaintiff's Post-Trial Motion for Leave to Communicate With Jurors is **DENIED**.

The court expects any future motions filed by Plaintiff's counsel to comply with the Local Rules and to be well-supported with facts, law, and thorough written argument. The three motions addressed in this order do not meet those standards and represent an unnecessary drain on the limited resources of this Court.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for New Trial, Plaintiff's Post-Trial Motion for Sanctions, and Plaintiff's Post-Trial Motion for Leave to Communicate With Jurors are **DENIED**.

ENTER: [1/9/96]

RUDY LOZANO, JUDGE
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

TERRY B. JONES,)
)
Plaintiff,)

vs.	)	No. 2:95-CV-83-RL
LINCOLN ELECTRIC CO., et al.,	)	
Defendants.	)	

ORDER

This matter is before the Court on Plaintiff's Amended Motion for Relief From Final Judgment Because of Newly Discovered Evidence Pursuant to FRCP 60 (B) (2), filed on July 7, 1997, and Plaintiff's Motion to Strike Defendants' Motion for Costs and Attorneys' Fees, filed on December 23, 1997. For the reasons set forth below, these motions are **DENIED.**

BACKGROUND

Plaintiff, Terry B. Jones, used to do welding work. He sued six manufacturers of welding products he used. Jones alleged that manganese in the products entered his body through fumes given off during the welding process, damaged his brain, and caused him to suffer manganese- induced Parkinsonism. The manufacturers argued that although Jones suffered from idiopathic Parkinsonism's Disease, a brain- centered condition, it was not caused by their products. ("Idiopathic" means the cause of a condition is unknown.) At trial, Dr. Thomas Eagar testified as an expert witness for the manufacturers. The jury returned a verdict for the manufacturers. Jones took an appeal. Almost a year after the verdict and while the appeal was still pending, Jones filed a motion for new trial, alleging in essence that Dr. Eagar gave false testimony.

DISCUSSION

Jones advances a motion under Federal Rule of Civil Procedure 60(b) (2), seeking a new trial based on newly discovered evidence. "There are five prerequisites to a successful Rule

60(b)(2) motion: (1) the evidence was discovered following the trial; (2) due diligence on the part of the movant to discover the new evidence is shown or may be inferred; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that a new trial would probably produce a new result.[1]" In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co., 78 F.3d 285, 293-94 (7th Cir. 1996), cert. denied 117 S.Ct. 763 (1997).[1] Rule 60(b) relief "is an extraordinary remedy that is to be granted only in exceptional circumstances." Provident Savings Bank v. Popovich, 71 F.3d 696, 608 (7th Cir. 1995). A district court's ruling on a Rule 60(b) motion is reviewed for abuse of discretion. Id.

Jones launches four main attacks on Dr. Eagar's testimony. First he says Dr. Eagar supplied a too low figure on the amount of manganese in welding fume. Defendants argue that Jones raised this argument too late. Jones first raised it in a hearing more than six months after he filed his Rule 60(b) motion and more than one year after judgment. By the express terms of Rule 60(b), motions based on newly discovered evidence such as Jones' must be brought within one year of the judgment the motion challenges.

Jones retorts that Defendants offer no authority for the proposition that adding material new aspects to a Rule 60 (b)(2) motion more than one year after judgment is forbidden. Yet beyond somewhat strained analogies to principles of fact-pleading and amending complaints, Jones offers no authority showing that

---

[1] The Seventh Circuit has at times talked of both the requirement that the evidence would "probably" produce a new result, and that the evidence would "likely" produce a new result. See, e.g., In re Chicago, Milwaukee, St. Paul & Pacific R.R., 78 F.3d at 293-94; Gomez v. Chodz, 867 F.2d 395, 405 (7th Cir. 1989); Mumford v. Bowen, 814 F.2d 328, 330 (7th Cir, 1986). This court concludes that under either term, the result here would be the same. The court will employ the term "probably" in this order, because that is the term most recently used by the Seventh Circuit.

he may inject the manganese- content issue into the current proceeding at this point. The Court believes that if the one year limitation is to have any force, litigants cannot be allowed to file a motion on the eve of the deadline and then fill in the particulars many months later – the rule that Jones' current position would foster. If authority to the contrary exists, then it is Jones' burden in seeking the extraordinary relief afforded by Rule 60(b) (2) to identify the authority for the Court.

Also, Jones does not convincingly assert that he was ignorant of the supposed true level of manganese in fume so that he was unable to impeach Dr. Eagar on that point at trial. The evidence Jones claims to have showing that Dr. Eagar's figure was wrong was not "new" within the meaning of Rule 60 (b) (2) if Jones had access to the same or similar evidence at trial. In sum, the Court will not further consider the issue of Dr. Eagar's testimony regarding manganese content in welding fume.

Next, Jones asserts that Dr. Eagar mischaracterized an article describing a study of welders, a study that he did not participate in. Dr. Eagar testified on redirect as follows regarding the article:

Q. [Plaintiff's counsel] asked you if you had considered an epidemiological study. Let me ask you the question a little bit differently. Do you believe that an epidemiological study of the effects of manganese in mild steel welding is something that's required?

A. Not anymore. It's already been done.

Q. In terms of mild steel, do you think there's any manganese risk to weding of mild steel?

A. The study didn't show it. Actually, it was done – they didn't name it, but there was a place in Illinois with 2,000 welders and 2,000 nonwelders working at the same plant and welding mild steel. And we all know its Caterpillar in Peoris, okay? And

the study showed the people who were welders did not have anymore diseases or health effects or leukemia or cancer or anything else than people who worked at Caterpillar who didn't weld.

Q. So the fact of welding mild steel had no impact on their health, correct?

A. That's correct. That was the conclusion of that study.

Jones argued that Dr. Eagar assigned conclusions to the Caterpillar article that the article does not support. Reviewing the article itself reveals that it primarily addressed lung cancer deaths among Caterpillar welders, but it also touched on the welders' death rate from other illnesses. Fairly condensing the questions and answers regarding the Caterpillar article, Dr. Eagar testified that an epidemiological study of the "effects" of manganese in mild steel welding had been performed, and did not show any "manganese risks." He also testified that the Caterpillar article showed that nonwelders who worked at Caterpillar had no more "health effects or leukemia or cancer or anything else" than non welders at Caterpillar. He stated that the article concluded that welding mild steel "had no impact on [the] health" of the welders at Caterpillar. As covered above, however, the article focused only on fatalities among welders caused by lung cancer and to a lesser extent other illnesses; Jones claimed he suffered a nonfatal "health effect," specifically, a neurological condition caused by manganese. Granted, as Defendants stress, Dr. Eagar never testified that the Caterpillar article directly ruled out the exact type of injury Jones claims he suffered. Yet by stating that the article showed no "health effects" and "no impact on ... health" from mild steel welding, Dr. Eagar suggested that the article had at least indirectly ruled out the type of nonfatal injury Jones claims.

Assuming that Dr. Eagar mischaracterized the conclusions of the Caterpillar article, Jones' motion still must be based on "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60 (b)(2); see Mares v. Busby, 34 F.3d 533, 535 (7th

Cir. 1994). Although Jones is not entirely specific, it seems that his "new" evidence is the Caterpillar article itself. Yet comments from Jones' counsel in closing argument suggest that he knew at that time what the article said and did not say:

> Let's dispose of Professor Eagar quickly. He became an epidemiologist – "There's no need for an epidemiological study" – he told you something about there's a cancer study – about Caterpillar – cancer study in welders. Well, if that study says anything about manganism or manganese- induced Parkinsonism, I'm sure that the neurologists would have known about it.
>
> Not even Dr. Olanow testified about that. Dr. Klawans didn't know about it. Dr. Shannon didn't know about it. But Eagar knew about it.

(Tr. Pp. 1898-99)

This comment indicates that counsel was aware of what the Caterpillar article did and did not say. Also, proceedings in this case have made it apparent that Jones' suit is not the only one of its type, and that the law firm representing Jones also represents several plaintiffs in other similar cases. Given this ongoing involvement in similar cases and the comments of Jones' counsel in closing argument, the Court finds it difficult to accept for purposes of Rule 60(b) relief that Jones' counsel knew nothing about the Caterpillararticle at the time of the trial. If counsel knew of the article, then it is not new evidence.

Even if counsel did not know of the article when Dr. Eagar testified, after the testimony counsel had an incentive to obtain and review the article as soon as possible to be sure that Dr. Eagar had described it fairly. Doing so would have allowed counsel to test Dr. Eagar's statements about the article at the trial or in a timely Rule 59 motion in the very way he attempts to do now in his Rule 60 (b) (2) motion. Counsel has not offered any reason why with due diligence he could not have obtained the article within this time frame.

In sum, the Caterpillar article was either known to Jones'

counsel at trial or could have been obtained in time to file a Rule 59 motion based on the article. As such, Jones cannot use the article now to obtain relief under Rule 60 (b) (2). See Mares, 34 F.3d at 535.

Next Jones alleges that Dr. Eagar falsely exaggerated his role in research that involved exposing the lungs of animals to welding fume. A Dr. Brain of Harvard, Dr. Antonini of Harvard, Dr. Ulrich of the University of New Hampshire, and other individuals cooperated in conducting the study. Jones argued that Dr. Eagar claimed a substantial role in conducting the study when in fact he was tangentially involved at best.

Jones points principally to a deposition that Dr. Brain gave in another welding case several months after the verdict in this case. Jones maintains that in this deposition, Dr. Brain denied having ever conducted joint research with Dr. Eagar. However, Jones reads too much into Dr. Brain's testimony. Taking the deposition in context shows that Dr. Brain holds a narrow personal view of what it means to "conduct joint research" with another person. Although Dr. Brain appeared to reject the notion that he and Dr. Eagar had ever closely collaborated on research – done what he called "joint research" – dr. Brain did clearly acknowledge that he had consulted with Dr. Eagar as a welding expert on a project that produced an article on certain effects of welding fume on rat lungs. Moreover, the deposition and hearing testimony Dr. Ulrich and deposition testimony from Dr. Antonini show that Dr. Eagar played a substantial although not dominant role in the rat lung study and other work involving animal lungs that preceded the study. Dr. Eagar simply did not testify otherwise at trial. The Court concludes that Dr. Eagar did not materially mischaracterize his participation in the animal lung research.

As his final main attack, Jones asserts that Dr. Eagar mischaracterized the results of that research. Jones essentially argues that Dr. Eagar falsely desribed the research as (1) addressing the ability of the body to absorb manganese in welding fume, and (2) showing that welding fume had no measurable toxic effect on rat lungs. Dr. Eagar's testimony on these two points was fractured by numerous objections and sidebars, but the essence of

it was as follows:

Q. And in terms of examining the work that has been completed, was there a discussion [between the persons who cooperated in conducting the research] regarding the form of the manganese after it's gone through the welding arc and its ability to be absorbed by the body?

A. Yes.

Q. In regard to conclusions regarding the form of the manganese after it passes through the welding arc, are you aware of what conclusions were reached?

A. Yes, I am.

Q. Are the conclusions reached regarding the ability of the body to absorb manganese in that form?

A. Yes.

Q. And what are those conclusions?

A. The conclusion was there was no difference between welding fume and just putting saline solution into the animal's lungs or putting pure iron oxide into the animal's lungs. And iron oxide is what usually used to be the non – completely nontoxic dust.

Q. And was one of the conclusions addressed to the toxicity of manganese after it passes through the welding arc?

A. Yes.

Q. And what was the conclusion?

A. We concluded that there is no measurable effect of welding fumes on the lungs – welding fume containing manganese on the lungs.

(Tr. Pp. 1382-89)

In evaluating whether this testimony was truthful, the Court has reviewed the writing produced out of the rat lung study and the work that preceded that study, and all other exhibits related to the study and preceding work. In particular, the Court has reviewed the entirety of the trial testimony of Dr. Eagar, the depositions of Dr. Brain, Dr. Antonini, and Dr. Ulrich, and has listened to Dr. Ulrich's hearing testimony.

Based on a careful and thorough review of all available materials, the Court concludes that Plaintiffs have shown at best that experts might subjectively disagree with whether the research on exposing animal lungs to welding fume supports the conclusion Dr. Eagar reported at trial. Any such disagreement would not turn on demonstrated and concrete truths and nontruths, but rather on individual scholarly perspective, individual experience , the limits of the scientific method and the murky qualities often manifested in conclusons reached "by committee" and by research projects without a well-defined beginning and end. That Dr. Eagar might have chosen to embrace certain logic or focus on certain items while Dr. Brain did not – in other words that the two have different opinions, interests, and perspectives – is not a basis for concluding that Dr. Eagar lied on the stand. Even Dr. Brain sprinkled his deposition testimony with terms like "I think," "I don't think," "my interpretation," "I don't believe so," "I don't know about that," etc. These terms signal that Dr. Brain was delivering his own opinions, which others like Dr. Eagar might legitimately dispute or revise.

The Court is mindful that although Dr. Eagar represented the conclusions of the animal lung research he described to be conclusions shared by himself, Dr. Brain, and Dr. Ulrich, evidence suggests that those three persons did not draw identical subjective conclusions. However, a statement from Dr. Eagar at trial such as, "We reached the following conclusions" can reasonably mean either that the three persons making up the "we" expressly stated and shared identical conclusions, or instead that their joint work produced certain hard numbers that no one disputed, but that could reasonably support similar although not identical individual opinions extrapolated from the hard numbers. In sum, Jones' charge that Dr. Eagar put words in the mouths of Dr. Brain and Dr. Ulrich that they would not have uttered is not completely convincing.

In any event, the words-in-their-mouths charge ultimately goes more to form than substance. Jones argues that Dr. Eagar tricked the Court into letting him describe conclusions regarding welding fume's physiological effects – physiology not being Dr. Eagar's area of expertise – by claiming that the conclusions were shared by others with the proper expertise. Even if Dr. Eagar did trick the Court this way, it is hard to see marterial and unfair prejudice to Jones on a Rule 60(b) motion if Dr. Eagar nonetheless offered conclusions that are supportable. A lay defense witness who takes a wild guess at a question of nuclear physics does not materially and unfairly prejudice the plaintiff if the guess is correct, because the witness has in the end conveyed reliable information to the jury. The Court has already concluded that the record shows Dr. Eagar as having ultimately given reasonably reliable conclusions.

In sum, Jones' new evidence that Dr. Eagar assigned unsupported conclusions to the animal lung research could at best set up a battyle of the experts and does not show that Dr. Eagar was objectively, demonstrably false in his testimony. Such evidence does not do much to support upsetting a judgment and ordering a new trial, which is only justified where the new evidence would "probably produce a new result." In re Chicago, Milwaukee, St. Paul & Pacific R.R., 78 F.3d at 294; see Diaz v.

Methodist Hosp., 46 F.3d 492, 495 (5th Cir. 1995) (reaching a like conclusion in a medical malpractice case involving new but merely impeaching evidence on whether a medical test could have been performed over a weekend).

Despite this conclusion, the Court will give particular attention to two of the relatively more weighty points raised in Jones' barrage on Dr. Eagar's testimony about the animal lung research. First, the Court acknowledges that Jones has perhaps succeeded in raising something of an objectively forceful challenge to any suggestion by Dr. Eagar that stainless steel fume, as opposed to mild steel fume, had no measurable toxic effect in the animal lung research. Assuming Dr. Eagar did make this suggestion, and that the suggestion was wrong, Jones nonetheless could not have been prejudiced unless he was exposed to stainless steel fume in his work. Jones has not argued with any specificity or citation to the record that he was exposed to any particular percentage of stainless steel fume. The Court will not the record of the two week trial looking for evidence to support such an argument. See Northwestern Nat'l Ins. Co. v. Baltes, 15 F.3d 660, 662-63 (7th Cir. 1994) (stating that district judges need not scour dense records on behalf of litigants).

Second, Jones suggests that Dr. Eagar misled the jury on the research results regarding absorption of manganese into the body. However, Dr. Eagar actually said little of substance on the topic of absorption.

Jones' theory was that manganese contained in the welding fume he breathed was absorbed into his body and made its way to his brain. Dr. Eagar did not directly refute this proposition when discussing absorption. What Dr. Eagar said about absorption, among the distraction and interruptions of objections and sidebars, was the following:

Q. Are the conclusions reached regarding the ability of the body to absorb manganese in that form?

A. Yes.

Q. And what are those conclusions?
A. The conclusion was there was no difference between welding fume and just putting saline solution into the animals's lungs or putting iron oxide into the animal's lungs. And iron oxide is what usually used to be the non-completely toxic dust.

This does not really say much about absorption. Dr. Eagar suggested that the body has the same ability to absorb welding fume, saline solution, and pure iron oxide – but he did not say what the common ability is. He then ended by addressing toxicity, not absorption, or perhaps mixing the two concepts. Overall, Dr. Eagar did not communicate to the jury clearly or in detail exactly what the research showed about absorption. Dr. Eagar certainly did not say that the research showed that it is impossible for manganese in welding fume to be absorbed by the lungs and then travel to the brain.

The lack of specificity in Dr. Eagar's testimony on absorption is echoed in the very arguments Jones now makes. Jones says that Dr. Eagar mischaracterized the animal lung research as having addressed absorption at all. Whether or not the research addressed the topic is not the crucial thing – what if anything the research showed about absorption is what matters. Dr. Eagar did not really say much about what the research showed.

On an important overall note, at the trial itself much of the wind was taken out of the challenge testimony by Dr. Eagar. Counsel pointed out that Dr. Eagar is not a toxicologist and not an expert on matters of physiology. Counsel suggested (both then and in the current briefs) that whatever the animal research showed regarding the toxic effect of fume on lungs, the research was not relevant to Jones' claim of brain damage. (Indeed, Dr. Eagar's pretrial deposition informed Jones' counsel that the animal lung research Dr. Eagar was involved in did not address the nervous system.) An expert witness for Jones, Dr. Klawans, testified in much more detail than Dr. Eagar on points much more relevant

than lung toxoicity and Eagar's fractured "conclusion" regarding absorption: Dr. Klawans discussed in detail his opinion, supported by research, that manganese can cause Parkinsonism in welders by entering their respiratory tract through welding fume, being absorbed into the bloodstream, and traveling to the brain. Regarding the Caterpillar study, as alluded to above, Jones' counsel knew enough about that study to point out for the jury its important limitation: that it primarily tracked lung cancer, not manganese- induced Parkinsonism. Finally, Dr. Eagar's own actions caused a poor impression in front of the jury, with the Court having to repeatedly admonish him to give responsive answers and not testify over granted objections.

Jones says a new trial without Dr. Eagar's testimony is warranted. But whatever force the testimony on the Caterpillar article and animal lung research had, Jones' counsel reduced it significantly at the first trial. Holding a new trial without the remaining force would not probably deliver a different result.

So far, the Court has analyzed Jones' claims and found little support for relief under Rule 60(b) (2). One point remains, and it is fundamental.

Defendant's position at trial was that even conceding their products can cause manganese-induced Parkinsonism in welders in general, Jones was not such a welder and had idiopathic Parkinson's disease. The testimony of four physicians backed Defendants up on this point, albeit with varying degrees of directness and force. Only one physician, Jones' expert witness, said Jones had manganese-induced Parkinsonism, and that testimony was significantly undermined on cross-examination. Across over eighty pages of briefing, Jones devotes hardly any space to showing how subtracting the alleged false testimony from Dr. Eagar would probably change the outcome in light of what the doctors said about the cause of his condition. As his only specific attack on the medicalcausation evidence, Jones offer the point that the pro-Defendants doctors diagnosed him with idiopathic Parkinson's disease, i.e., Parkinson's disease with an unknown cause. Yet contrary to what Jones suggests, that did not place on Defendants the burden of disproving that manganese caused his

condition; as Plaintiff, Jones bore the burden of proving the cause. In any event, the reality is that much of the doctors' testimony did rule out manganese as a cause either explicitly or implicitly.

In summary, even if the testimony by Dr. Eagar that Jones attacks was false, holding a new trial without that testimony would not "probably produce a new result." In re Chicago, Milwaukee, st. Paul & Pacific R.R., 78 F.3d at 294. For this overarching reason, and the reasons previously stated, Jones is not entitled to relief under Rule (b) (2).

Defendants have filed a motion seeking to recover expenses they incurred because of Jones' Rule 60 (b) (2) motion. Jones filed a motion arguing that this motion is premature and should be stricken. Now that the Court has denied Jones' motion, Defendants' motion to recover expenses does not appear premature. Accordingly, Jones shall have fifteen days from the date of this order to file a response to the motion, and Defendants shall have seven days to file any reply.

CONCLUSION

For the foregoing reasons, Plaintiff's Amended Motion for Relief From Final Judgment Because of Newly Discovered Evidence Pursuant to FRCP 60 (b) (2), and Plaintiff's Motion to Strike Defendants' Motion for Costs and Attorneys' Fees, are **DENIED.**

ENTER:

RUDY LOZANO, JUDGE
United States District Court

FRCP Rule 26
Federal Rules of Civil Procedure Rule 26

UNITED STATES CODE ANNOTATED
FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
V. DEPOSITIONS AND DISCOVERY

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Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures. Except to the extent otherwise stipulated or
directed by order or local rule, a party shall, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

Unless otherwise stipulated or directed by the court, these disclosures shall be made at or within 10 days after the meeting

of the parties under subdivision
(f). A party shall make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.
(2) Disclosure of Expert Testimony.
(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same

subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) Pretrial Disclosures. In addition to the disclosures required in the preceding paragraphs, a party shall provide to other parties the following information regarding the evidence that it may present at trial other than solely for impeachment purposes:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises. Unless otherwise directed by the court, these disclosures shall be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under subparagraph (B) and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under subparagraph (C). Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(4) Form of Disclosures; Filing. Unless otherwise directed by order or local rule, all disclosures under paragraphs (1) through

(3) shall be made in writing, signed, served, and promptly filed with the court.

(5) Methods to Discover Additional Matter. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or
45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations. By order or by local rule, the court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking

discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the

person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule
35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
TEXT (b) (4) (C)

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or

disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the disclosure or discovery not be had;

(2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

TEXT

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Timing and Sequence of Discovery. Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may not seek discovery from any source before the parties have met and conferred as required by subdivision (f). Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Disclosures and Responses. A party who has made a disclosure under subdivision (a) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its disclosures under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert, and any additions or other changes to this information shall be disclosed by the time the party's disclosures under Rule 26(a)(3) are due.

(2) A party is under a duty seasonably to amend a prior

response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(f) Meeting of Parties; Planning for Discovery. Except in actions exempted by local rule or when otherwise ordered, the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by subdivision (a)(1), and to develop a proposed discovery plan. The plan shall indicate the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under subdivision (a) or local rule, including a statement as to when disclosures under subdivision (a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(4) any other orders that should be entered by the court under subdivision (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

(g) Signing of Disclosures, Discovery Requests, Responses, and Objections.

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the disclosure is complete and correct as of the time it is made.

(2) Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:

(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it

until it is signed.

(3) If without substantial justification a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

CREDIT(S)

(As amended 1993)

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1,

1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970;

Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2,

Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions

(a) Motion For Order Compelling Disclosure or Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling disclosure or discovery as follows:

(1) Appropriate Court. An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the district where the discovery is being, or is to be, taken.

(2) Motion.

(A) If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(B) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may
move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in

good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(4) Expenses and Sanctions.

TEXT (a) (4) (A)

(A) If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the
disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order
authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an

award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) Sanctions by Court in District Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to

obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination. In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose
information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule and may include informing the jury of the failure to make the disclosure.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the

requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it
finds that (A) the request was held objectionable pursuant to Rule 36(a), or
(B) the admission sought was of no substantial importance, or
(C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34,
after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response
without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that

other circumstances make an award of expenses unjust. The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

(e) [Abrogated]

(f) [Repealed. Pub.L. 96-481, Title II, s 205(a), Oct. 21, 1980, 94 Stat. 2330]

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or a party's attorney fails to participate in good faith in the development and submission of a proposed discovery plan as required by Rule 26(f), the court may, after opportunity for hearing, require such party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

CREDIT(S)

(As amended, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1,
1970; Apr. 29, 1980, eff. Aug. 1, 1980; Pub.L. 96-481, Title II, s 205(a),
Oct. 21, 1980, 94 Stat. 2330; Mar. 2, 1987, eff. Aug. 1, 1987.)

999 Electronic Update

(As amended Apr. 22, 1993, eff. Dec. 1, 1993.)

UNITED STATES CODE ANNOTATED

RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

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Rules amendments received to 9-7-99

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

CREDIT(S)

1984 Main Volume

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1937.)

UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

TERRY B. JONES, Plaintiff,	)	No: 2-95-CV-83-RBT
	)	Judge R. Lozano
v.	)	
	)	Magistrate A. Radovich
LINCOLN ELECTRIC CO. et al, Defendants	)	

PLAINTIFF'S RENEWED MOTION TO STRIKE TESTIMONY OF DR. THOMAS EGAR

NOW COMES plaintiff, by and through his attorneys, and moves this honorable court, pursuant to Federal Rules of Civil Procedure, Rule 26 to Strike certain portions of Dr. Thomas Egar's testimony, and instruct the jury to disregard it, and in support, states as follows:

1. On December 6, 1995 defendants presented Dr. Thomas Egar for testimony.

2. Dr. Egar stated in testimony that he was neither an epidemiologist nor a toxicologist. He admitted he had no training nor
expertise in either field. On plaintiff's objection, this court ruled

plaintif's objection that Egar lacked experience to opine as to a certain toxicological study he was familiar with; that being the study of Dr. Brain, dealing with toxicological effect of welding fumes.

3. The court however allowed, over plaintiff's objection, Dr. Egar to testify on the conclusion of the study, since he had conversations with the authors, including Dr. Brain.

4. Plaintiff renews his objection at this time and asks the court to strike all reference to the toxicology study. Dr. Egar has no basis from which to testify. He offered opinions without such basis which were highly prejudicial to plaintiff, and without a way to counter, since he had no expertise in the field.

5. Additionally, all reference to the aforementioned toxicology study should be strickened because the disclosure of such information was made known to the plaintiff for the first time, when Dr. Egar testified; clearly in violation of Rule 26.

6. On the very same basis as numbers 1-5 above, the plaintiff moves the court to strike all reference to the "Caterpillar Study" discussed by Dr. Egar. The witness admitted he was not an epidemiologist. However, he then stated an epidemiologist study of the health effects of mild steel welding/manganese exposure to welders was not necessary since it "had already been done". Dr, Egar then discussed the study. However, he has no basis from which to speak to the study in any respect at all since it is clearly out of his field of expertise.

7. Additionally, defendant did not disclose the "Caterpillar Study". Plaintiff first learned of it during re-direct testimony, in clear violation of Rule 26.

8. In short, Dr. Egar offered testimonyon areas he admittedly had no expertise. Defendant's did not, and when pressed by plaintiff's through objection, could not qualify him as an expert in toxicology nor epidemiology. As such any such testimony is baseless, highly prejudicial to plaintiff, and should be stricken.

WHEREFORE plaintiff respectfully request the relevant portions of Dr. Egar's testimony be stricken from the record and the jury be instructed to disregard same.

By:_____
Steven R. Penn., Esq.

Michael P. Cascino, Esq.
Frank E. Stachyra, Esq
Steven R. Penn, Esq
Cascino Vaughan Law Offices Ltd.
403 W. North Avenue
Chicago, IL. 60610
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UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

CHARLES J. McCARTY, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action
	)	No.930094-0 (C)
	)	in the United States
	)	District
THE LINCOLN ELECTRIC COMPANY, et al.,	)	Court for the Western District of Kentucky
Defendants.	)	

RESPONSES AND OBJECTIONS OF PROFESSOR JOSEPH D. BRAIN TO SUBPOENA FOR PRODUCTION OF DOCUMENTS

Professor Joseph D. Brain ("Professor Brain"), pursuant to Rules 26 and 45(c)(2) of the Federal Rules of Civil Procedure, through his undersigned counsel, hereby objects to the subpoena for the production of documents dated July 22, 1996 and served on July 29, 1996, issued by the plaintiffs. A copy of the subpoena is attached to these objections as Exhibit "A".

As grounds for his objections, Professor Brain states as follows:

General Objections

A. The subpoena is unreasonable and unduly burdensome

in that it does not provide adequate time for response, particularly in light of the breadth of the requests.

B. The subpoena is overboard, unduly burdensome, and

not reasonably calculated to lead to the discovery of admissible evidence.

Specific Objections and Responses

Requests No. 1

Your most recent curriculum vitae or resume and a list of all publications (articles, abstracts, book chapters, posters, etc.) to which you have contributed.

Response

Without waiver of the General Objections, Professor Brain will produce a mutually agreeable time and place a copy of his most recent curriculum vitae and a list of all publications on which he is author or co-author.

Request No. 2

All publications you have written, or participated in the writing of, concerning Manganese.

Response

Without waiver of the General Objections, Professor Brain states that he has not written any publications specifically concerning manganese. Items 219 and 222 on Professor

Brain's curriculum vitae touch on the subject of manganese. Professor Brain will make copies of those items available at a mutually agreeable time and place.

Request No. 3

All documents you have consulted or found authoritative in your research on welding fumes, Manganese exposure, Manganism or Manganese Induced Parkinsonism.

Response

Without waiver of the General Objections, Professor Brain objects to Request No. 3 on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 4

All documents relating to all research, joint or otherwise, you have conducted with Dr. Thomas W. Eager on welding fumes.

Response

Without waiver of the General Objections, Professor Brain states that there are no such documents.

Request No. 5

A list of names of all contributors to or sponsors of research you have conducted, joint or otherwise, with Dr. Thomas W. Eager on welding or welding fumes. This list shall include the names of contributors, amount given, years given and to what purpose said sum was applied.

Response

Without waiver of the General Objections, Professor Brain states that he has not conducted any research with Dr. Thomas W. Eager. Accordingly, there are no such documents.

Request No. 6

All documents concerning the funding of research you conducting with Thomas W. Eager on welding fumes.

Response

Without waiver of the General Objections, Professor Brain states that there are no such documents.

Request No. 7

All documents involving you and the defendants (see attached service list) or their attorneys in any litigation whatsoever regarding welding.

Response

Without waiver of the General Objections, Professor Brain states that there are no such documents.

Request No. 8

A complete list of any and all litigation in the past five years for which you have been consulted in any matter regarding welding or welding fumes. This list shall include complete case names, number, court and for whom you consulted and whether or not you were required to testify either in court or in deposition.

Response

Without waiver of the General Objections, Professor Brain states that there are no such documents.

JOSEPH D. BRAIN
By his attorneys,

Robert B.Donin (BBO #543056)

Office of the General Counsel
Harvard University
Holyoke Center, Suite 980
Cambridge, MA 02138

CERTIFICATE OF SERVICE

I certify that a true copy of the above document was served upon the attorney of record for each party by fax and first-class mail, postage prepaid, on August 2, 1996.

Robert B. Doni

11.

CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger: nor shall any person be subject for same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself. Nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.

12.

CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENT V

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

13.

CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENT V

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.